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941461 JAN 17 1995

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No.

IN THE

Supreme Court of the United States

October Term, 1994

LEONARD E. BRISCOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a grand jury investigation is conducted without the authorization required by the Ethics in Government Act of 1978, whether the resulting indictment is invalid.

2. Whether an independent counsel under the Ethics in Government Act of 1978 can voluntarily relinquish authority and control relating to the prosecution of a matter within its core mandate to the Department of Justice by authorizing the Department of Justice to conduct and control proceedings within that core mandate.

3. Whether the Fifth and Sixth Amendments to the United States Constitution, and Federal Rule of Criminal Procedure 7(c)(1), require that a defendant who is charged with giving, offering, or promising gratuities, in violation of 18 U.S.C. § 201(c)(1)(A), must be informed of what the alleged gratuities were and when they were given, offered, or promised.

LIST OF PARTIES

Leonard E. Briscoe, Petitioner

Maurice David Steier, Defendant-Appellant

Lance Henry Wilson, Defendant-Appellant

United States of America, Respondent

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leonard E. Briscoe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision by the United States Court of Appeals as to which review is sought (App. A-1 to A-37) is reported as *United States v. Wilson*, 26 F.3d 142 (D.C. Cir. 1994). The Order and Opinion by the United States District Court for the District of Columbia dated August 7, 1992 and August 14, 1992 (App. A-41 to A-52), which are referenced in the District Court's Order dated September 28, 1992 (App. A-38 to A-39), are reported as *United States v. Briscoe*, 798 F. Supp. 28 (D.D.C.

1992). The other opinions and orders in this case (App. A-38 to A-40, A-53 to A-57) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 17, 1994. App. A-62. A timely petition for rehearing was denied on October 19, 1994. App. A-61. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, 18 U.S.C. § 201(c)(1)(A), 28 U.S.C. § 594(a), (d), and (e), 28 U.S.C. § 597(a), Fed. R. Crim. P. 7(c)(1), and Fed. R. Crim. P. 7(f) are set forth in the Appendix. App. A-74 to A-79.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance in this case is 18 U.S.C. § 201(c).

On July 7, 1990, the United States Attorney's Office for the Southern District of Florida, which is part of the Department of Justice (hereinafter, "DOJ"), reached a cooperation agreement with DuBois Gilliam (hereinafter, "Gilliam"), the former Deputy Assistant Secretary for Program and Policy Development and Evaluation at the Department of Housing and Urban Development (hereinafter, "HUD"). App. A-3. Gilliam had already testified before Congress pursuant to a grant of immunity. *Id.*

On or about July 16, 1990, a Division of the United States Court of Appeals for the District of Columbia Circuit issued an order expanding the mandate of the Office of Independent Counsel (hereinafter, the "IC"), headed by Arlin M. Adams, to enable the IC to investigate "the administration of the Department [*i.e.*, HUD]'s Urban Development Action Grant Program"

(hereinafter, the "UDAG" program) and "whether Samuel R. Pierce, Jr., and other *officials of the Department* [of Housing and Urban Development], *and other persons* or entities, from 1984 through 1988 inclusive, may have committed the crime of conspiracy to defraud the United States, or any other federal crimes" relating to (*inter alia*) the UDAG program. App. A-59 to A-60 (emphasis added).

In the eleven months following the grant of authority to the IC, DOJ continued to conduct grand jury proceedings relating to Gilliam's allegations, including allegations that Leonard E. Briscoe, the Petitioner herein (hereinafter, "Petitioner"), had offered and given gratuities to Gilliam in relation to the administration of the UDAG program by HUD. App. A-3 to A-4, A-81 to A-90. Gilliam testified before the grand jury in the Southern District of Florida in September 1990. App. A-173 to A-174. As DOJ essentially acknowledged, these alleged offenses clearly came within the mandate of the IC, which was charged with investigating all criminal activity relating to HUD's administration of UDAG programs during 1984-1988. App. A-97 to A-99. Gilliam "was at the center of the alleged criminal activities" which the IC was charged with investigating. App. A-3.

Ultimately, on June 12, 1991, the grand jury convened by DOJ in the Southern District of Florida issued an indictment charging Petitioner with (*inter alia)* two counts of offering and giving gratuities to Gilliam, in violation of 18 U.S.C. §§ 201(c)(1)(A) and 2, in relation to the administration of UDAG programs by HUD in Count III and Count V. App. A-81 to A-90. The indictment did not specify what the gratuities were (instead stating that they were "money and other things of value," App. A-87 to A-88), and did not specify when they were given, offered, or promised except that the acts in Count III allegedly took place at some time over a two-year period, from "in or about November 1985 to in or about late 1987," App. A-87, and those in Count V

allegedly took place at some time over a period of almost three years, from "in or about May 1986 to in or about March 1989," App. A-88. There was an overlap between the two counts of approximately one and one-half years.

At no time prior to June 12, 1991 (the date of the indictment) did DOJ have written authorization from the IC to continue its investigation. However, at some time on June 12, 1991, the IC issued a letter to the United States Attorney for the Southern District of Florida "hereby authoriz[ing] your Office's investigation and, if appropriate, prosecution" of (*inter alia*) "a possible conspiracy among Leonard Briscoe, David Steier, and others to bribe a government official, Dubois Gilliam." App. A-80. The record does not reflect, and the Government has refused to inform Petitioner, whether the letter was sent before or after the issuance of the indictment.

Upon Petitioner's motion, the indictment was subsequently transferred to the United States District Court for the District of Columbia, where (over Petitioner's objection) it was consolidated with a federal indictment (hereinafter, the "third superseding indictment") obtained by the IC from a grand jury sitting in the District of Columbia. App. A-5. (Counts II-VII were simply left blank in the third superseding indictment, so that the counts from the Florida indictment could be simply substituted without change and without being presented to a new grand jury.) Petitioner requested particulars as to what the gratuities were that were alleged in the DOJ indictment, and when they were given, offered, or promised. Both DOJ and the IC refused to provide a bill of particulars. Petitioner twice moved for bills of particulars to specify (*inter alia*) what the gratuities were, but the United States District Courts for both the Southern District of Florida and the District of Columbia denied the motions. App. A-40, A-53 to A-57. The discovery provided to Petitioner included a "book" created by Gilliam (apparently from memory during the course of the investigation), in which Gilliam pur-

portedly listed all of the "bribes" he had received. App. A-122 to A-125, A-129 to A-130, A-133 to A-134.

Petitioner also moved to dismiss the indictment issued by the Florida grand jury on the ground that DOJ did not have prosecutorial jurisdiction over matters within the IC's mandate, and that the indictment was therefore invalid. This motion was denied by the United States District Court for the District of Columbia. App. A-38 to A-39.

At trial, the Government elicited testimony from Gilliam about numerous alleged promises and bribes, covering a wide range of times from 1984 to 1989, including bribes that had not been included in the "bribe book," nor elsewhere in the discovery. The "bribe book" not only failed to provide adequate notice of the alleged gratuities but affirmatively misled Petitioner into believing that no alleged "bribes" would be presented at trial that were not contained in the book that had been prepared by the Government's key witness and which the Government itself had presented in discovery. *See* App. A-122 to A-125, A-129 to A-130, A-133 to A-134. Despite this, the District Court refused to take any action, App. A-135, or to permit a special verdict by the jury, by which Petitioner could (albeit post-trial) have ascertained what act(s) constituted the alleged offenses, *see* App. A-176 to A-179.

Petitioner was convicted of the two gratuity counts mentioned above that were contained in the indictment obtained in the Southern District of Florida, and was acquitted of all other counts in the consolidated cases. App. A-5. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit (hereinafter, the "court below"), which affirmed the judgment in an opinion (hereinafter, the "Decision") dated June 17, 1994. *See* App. A-37. Petitioner then filed a petition for rehearing, which was denied on October 19, 1994. App. A-61.

REASONS FOR GRANTING THE WRIT

This case raises novel and important issues relating to the scope of the prosecutorial jurisdiction of independent counsels appointed pursuant to the independent counsel provisions of the Ethics in Government Act of 1978, as amended (hereinafter, the "Act"), 28 U.S.C. §§ 591-599, and involves a split in approach between circuit courts of appeals. In *United States v. Fernandez*, 887 F.2d 465 (4th Cir. 1989), the court held that the Act effected a transfer of prosecutorial jurisdiction away from DOJ and towards the IC, and that DOJ lacked independent authority to take action with regard to matters within the scope of the IC's mandate. In the instant case, the United States Court of Appeals for the District of Columbia Circuit upheld the conviction even though it was based on an indictment that resulted from a grand jury investigation that was conducted by DOJ without authority, in effect holding that DOJ retained the power to prosecute and that its failure to obtain authorization did not involve a jurisdictional defect. Petitioner submits that these decisions are in conflict, and that the issue is likely to recur as the independent counsel law, recently re-enacted, is invoked in future investigations. Petitioner submits that this case raises issues of great public importance, especially in light of the importance of the matters typically entrusted to independent counsels, and the effect of the proper functioning of the independent counsel law on the public's perception of the administration of justice.

This case also raises an important issue, not previously decided by this Court, as to the requirements of due process for notice to defendants who are charged with violation of the gratuities statute, 18 U.S.C. § 201(c)(1). Petitioner submits that the decision of the court below, that the Government need not provide notice of what the gratuity was or when it was given, offered, or promised, conflicts with this Court's decision in *Russell v. United States*, 369 U.S. 749 (1962), and that the issue

is likely to recur in future prosecutions under the gratuities statute.

I. THE INDICTMENT IN THIS CASE IS INVALID BECAUSE THE GRAND JURY INVESTIGATION AT ISSUE TOOK PLACE AT A TIME WHEN THE DEPARTMENT OF JUSTICE AND THE GRAND JURY LACKED THE POWER TO INVESTIGATE OR PROSECUTE.

A. In The Absence Of Written Authorization From The Independent Counsel, The Ethics In Government Act Of 1978 Strips The Department Of Justice Of Power To Act With Regard To Any Matter Within The IC's Mandate.

The Decision upholding Petitioner's conviction is inconsistent with both the language and purpose of the Act, which places a jurisdictional limitation on DOJ's power to act in matters entrusted to an IC. Both the wording of the Act and its legislative history reflect that it was based on a recognition that certain prosecutions, relating to allegations of corruption by high-ranking Executive Branch officials, cannot properly be handled by DOJ (a part of the Executive Branch), because DOJ's involvement would raise both the appearance and the reality of a conflict of interest. *See* S. Rep. No. 170, 95th Cong., 1st Sess. (1977) (hereinafter, "S. Rep. No. 170") at 5-6, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4221-22.

Therefore, the purpose of the Act is to transfer "prosecutorial jurisdiction," 28 U.S.C. § 594(a), from DOJ and vest it exclusively in the IC. To that end, the Act grants "full power and independent authority to exercise *all* investigative and prosecutorial functions and powers of the Department of Justice" regarding "all matters in such independent counsel's prosecutorial jurisdiction," with the single exception of wiretapping under 18 U.S.C. § 2516. § 594(a) (emphasis added). The Act also enumerates specific powers that are "include[d]" within the

grant of authority, including the "full power" of "conducting proceedings before grand juries and other investigations," 28 U.S.C. § 594(a)(1); "participating in court proceedings," § 594(a)(2); "appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity," § 594(a)(3); and "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling *all* aspects of any case, in the name of the United States," § 594(a)(9) (emphasis added). The Act's grant of "full power" to the IC within its "prosecutorial jurisdiction" applies "[n]otwithstanding any other provision of law." § 594(a).

Consistent with its purpose, the Act makes clear that, once the IC is entrusted with jurisdiction, DOJ no longer has any power to act within the scope of the IC's mandate except at the IC's instigation. Thus, the Act requires that "*[w]henever* a matter is in the prosecutorial jurisdiction of an independent counsel . . . the Department of Justice . . . *shall* suspend *all* investigations and proceedings regarding such matter," 28 U.S.C. § 597(a) (emphasis added), except in two instances. The first instance is when the IC itself requests assistance from DOJ under § 594(d)(1), *e.g.*, by providing "access to any records, files, or other materials," and "the use of the resources and personnel necessary" for the IC to perform its duties, §§ 594(d)(1), 597(a). The second instance is when "such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice." § 597(a).

Thus, the language of the Act itself makes clear that the grant of "full power and independent authority" (§ 594(a)) to the IC (a grant which the United States Court of Appeals for the Fourth Circuit characterized as "broad" and "unequivocal," *Fernandez*, 887 F.2d at 468), as to "all" matters, "all" functions and powers, and "all" aspects of any case within the mandate,

§ 594(a), is a grant of exclusive prosecutorial jurisdiction and strips DOJ of any independent power to act. Moreover, the legislative history further emphasizes Congress's concern about the dangers that would result if DOJ retained independent power to act within the IC's mandate; indeed, the Senate Report states that "[t]he whole purpose of this chapter is defeated if a special prosecutor is not independent and does not have clear authority to conduct a criminal investigation and prosecution without *interference*, supervision or control by the Department of Justice." S. Rep. No. 170 at 66, 1978 U.S.C.C.A.N. at 4282 (emphasis added).

Moreover, any contrary interpretation — that DOJ's powers are unaffected by the grant of "prosecutorial jurisdiction" to the IC, and that DOJ retains power to act within the IC's mandate — would lead to ludicrous results that would frustrate the purposes of the Act. Unless DOJ is deemed to be stripped of power to act in the absence of the IC's written authorization, DOJ could act so as to cause severe and irreversible damage to the IC's ability to fulfill its mandate. By the very nature of prosecutorial jurisdiction, and without any bad faith, DOJ could act in numerous ways that would impede and interfere with the IC: for example, DOJ could reach plea agreements (including pleas of *nolo contendere*) with targets of the IC's investigation, and obtain the entry of consent judgments, which under the Double Jeopardy Clause of the Fifth Amendment to the Constitution would bar further prosecution by the IC for offenses arising from the same facts. DOJ could also make charging decisions, such as charging lesser offenses, and could bring cases that, once jeopardy had attached, would bar IC prosecutions. DOJ could reach immunity agreements and seek immunity from district courts for targets or potential targets of the IC's investigation, and could make decisions to charge certain defendants with greater offenses and other defendants with lesser offenses, either to obtain the cooperation of certain defendants or because of favoritism or preferential treatment. All of these

are matters as to which "full power" is invested in the IC by 28 U.S.C. § 594(a), and it is clearly inconsistent with the exercise of that "full power" to conclude that DOJ also retains "full power" as to the same matters.

Indeed, unless DOJ no longer has the power to act, DOJ could obtain consent judgments against *every* potential target of the IC's investigation, based on the same facts that underlie the IC's mandate. Thus, DOJ would be able to bar the IC from prosecuting *any* offense within its mandate.[1] In a "worst-case scenario," DOJ could even collude with a target to provide him or her with favorable treatment, or with preferential treatment relative to other targets, before the IC has had an opportunity to investigate or prosecute — for example, by obtaining a consent judgment to a lesser offense, conditional on an agreed penalty, in a forum that the target considers favorable to him or her, thereby barring any further prosecution arising from the same facts. This would deprive the IC of the "full power" expressly granted by § 594(a).

Even when both sides are acting in good faith, whenever DOJ is permitted to prosecute cases within the IC's mandate, DOJ has the power to tie the IC's hands and prevent the IC from exercising its full power and discretion within that mandate. In this very case, for example, Gilliam was granted immunity and cooperated with DOJ's investigation. The United States Attorney's Office for the Southern District of Florida thereby had the ability to prevent the IC from prosecuting Gilliam in that district — even if (as DOJ contended) it was the only district in which venue could be had, App. A-92, A-94 to A-95, and even if the IC later determined that it wanted to prosecute Gilliam. As a result, the IC's power became limited: the matters that DOJ was pursuing were, in effect, carved out of the IC's mandate. Thus,

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[1] Moreover, if DOJ failed to comply with § 597(a), the IC would not even have notice that DOJ was proceeding with such cases, and would therefore not be able to intervene to prevent judgment from being entered.

as a practical matter, any prosecution or investigation by DOJ within the core of the IC's mandate has the potential to cut off the "full power and independent authority" of the IC in the very area which Congress intended to entrust to the IC.

Accordingly, lower courts have recognized that the Act vests exclusive jurisdiction in the IC regarding matters within the IC's mandate. In *Fernandez*, the court held that DOJ lacked the power to appeal a ruling in a matter entrusted to the IC, on the basis that § 594(a) of the Act was "an example of emphatic statutory draftsmanship" that effected "a sweeping *transfer* of prosecutorial and investigative authority from the Attorney General to independent counsel." 887 F.2d at 468 (emphasis added). *Accord United States v. North*, 713 F. Supp. 1441, 1441 (D.D.C. 1989) (Act's grant of "full power and independent authority" to IC deprived DOJ of power to move for a stay).

While the court below purports to harmonize these decisions, the rights to appeal rulings and to make motions are simply two of the enumerated "functions and powers" as to which § 594(a) grants "full power" to the IC; thus, they are no different from the power of "conducting proceedings before grand juries and other investigations" granted by the same provision. Despite this, the court below held that the appointment of an IC does not withdraw authority from DOJ to investigate and conduct grand jury proceedings that fall within the IC's mandate. App. A-8. Instead, the court treats the Act as if it did not deprive DOJ of the independent power to "conduct[] proceedings before grand juries," 28 U.S.C. § 594(a)(1), as to matters within the IC's mandate, and disregards the plain language of § 597(a), treating it as if it held that DOJ may suspend its proceedings (rather than "shall") and need do so only in some cases when a matter is in the IC's prosecutorial jurisdiction (rather than "[w]henever"). *See* App. A-11 to A-12. Indeed, the court addresses the issue as if it did not involve an issue of jurisdictional power at all, but merely an exercise of the court's

supervisory authority. Petitioner submits that this conflicts with *Fernandez* and represents a misreading of the statute.

B. When The Grand Jury Investigation Is Unauthorized, A Written Authorization That Comes At The Conclusion Of The Investigation Cannot Have Retroactive Effect.

While the IC issued a letter on June 12, 1991, the same day as the indictment issued, purportedly authorizing an investigation, such an authorization cannot legitimize the grand jury investigation that had already occurred, for several reasons. First, the terms of the IC's letter only purported to authorize a *prospective* investigation, as reflected by the fact that it contemplated "investigation and, *if appropriate*, prosecution." App. A-80 (emphasis added). Thus, even assuming that the IC had the power to do so, the IC did not attempt to grant DOJ prosecutorial jurisdiction retroactively or *nunc pro tunc*.

Second, the Act does not authorize the IC to grant "retroactive jurisdiction." Under 28 U.S.C. § 597(a), the IC itself only has power to "agree[] . . . that such investigation . . . may be *continued* . . . ." *Id.* (emphasis added). Thus, the IC only has statutory power to provide prospective authorization; it cannot go back and agree that an already-completed grand jury investigation was valid. The requirement that the authorization be "in writing" similarly supports the conclusion that DOJ is powerless to proceed until it complies with the Act, because it clearly and unambiguously expresses Congress's requirement that DOJ "shall" cease its proceedings even if it has received oral authorization from the IC. Moreover, as discussed more fully in Section II below, the legislative history clearly reflects Congress's intent that DOJ is required to stop its investigation even as to matters that are merely "peripheral" to the IC's mandate. S. Rep. No. 170 at 76, 1978 U.S.C.C.A.N. at 4292.

The terms of the Act speak expressly in terms of the timing of the investigation vis-a-vis the IC's agreement: the Act pro-

vides that DOJ "*shall* suspend" any investigation "*except insofar* as" the IC agrees that it "may be *continued*," 28 U.S.C. § 597(a) (emphasis added). Thus, the wording of the Act requires that the exclusive manner of proceeding is that, first, DOJ "shall" suspend its proceeding; then, it must obtain written authorization from the IC; and only then can the proceeding be "continued." The reference to "suspend[ing]" the investigation until it can be "continued" makes clear that DOJ has no power to proceed *until* it has the IC's written authorization.

Moreover, even if the Act were less clear on this point than it is, the IC still would not be able to grant "retroactive jurisdiction." If DOJ and the grand jury lacked authorization throughout the grand jury's investigation and the presentation of evidence to the grand jury, the IC could not then "rewrite history" by simply declaring that DOJ had always had the jurisdiction, any more than a judge can revive a lapsed grand jury by declaring *nunc pro tunc* that its term has been extended (*see United States v. Daniels*, 902 F.2d 1238, 1240 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990)); whatever the IC authorized afterwards, the fact remains that *at the time*, the grand jury's lengthy investigation was not authorized and was expressly barred by the Act.

C. Because The Department Of Justice Lacked Prosecutorial Jurisdiction, Any Resulting Indictment Is Invalid.

As the section above discusses, the investigation in this case was clearly conducted at a time when DOJ, and therefore the grand jury, lacked the statutory power to investigate. This raises the issue of whether the indictment was justified in any event because the IC's written authorization may have occurred just prior to (although on the same day as) the issuance of the indictment.[2]

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[2] As noted above, it is not certain whether the letter was issued before or after the indictment. Petitioner made numerous requests for this information, to which the Government refused to respond. Petitioner submits that, if

Petitioner submits that the indictment is void regardless of whether the written authorization came immediately before or immediately after the issuance of the indictment. The evidence that was presented to the grand jury was presented by individuals who, under the Act, had no power to do so. Thus, the indictment can have had no valid jurisdictional basis.

In this case, DOJ and the grand jury conducted their investigation at a time when DOJ lacked prosecutorial jurisdiction. Thus, the evidence had not been presented to the grand jury by a validly authorized prosecutor; DOJ and the grand jury lacked the *power* to investigate. The alleged offenses — the giving of gratuities to a high-ranking HUD official in relation to the administration of the UDAG program — clearly constituted "a matter . . . in the prosecutorial jurisdiction of an independent counsel" under § 597(a), as DOJ has acknowledged, App. A-97, A-99, and the grand jury investigation went on for eleven months following the order granting the IC jurisdiction over the matter. Moreover, the key testimony of Gilliam, who was the alleged recipient of the gratuities and who was "at the center of the alleged criminal activities" (App. A-3), had been presented to the grand jury in September 1990 — approximately nine months before the indictment issued, App. A-173 to A-174. Moreover, Gilliam had already testified to Congress before the IC's mandate had been expanded in July 1990. App. A-3. Clearly, DOJ was on notice for almost a year or more that the matter was within the IC's jurisdiction. Indeed, the IC's mandate had been enlarged in July 1990 (App. A-58 to A-60) specifically to assure that its mandate covered the matters DOJ thereupon proceeded to investigate. Despite this, the first time the IC even purported to authorize DOJ to investigate the matter was on the very day of the indictment. App. A-80.

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the letter had been issued before the indictment, it is reasonable to believe that the Government would have been eager to state this fact. *Cf.* App. A-101.

Petitioner submits that, when the grand jury investigation and the presentation to the grand jury is conducted by individuals without prosecutorial jurisdiction to do so — *i.e.*, without authority to act — the indictment is invalid. DOJ presented its evidence to the grand jury at a time when the Act had expressly stripped DOJ of the power to do so. Moreover, not only was the prosecutor unauthorized to act in presenting evidence to the grand jury; the grand jury was also unauthorized to receive or consider the evidence, because a grand jury may only receive, consider and act upon evidence presented to it by a duly authorized prosecutor.

In an analogous situation, courts have found that an indictment is invalid if it is issued by a grand jury whose term has expired — *i.e.*, a grand jury without authority to act. *See, e.g.*, *United States v. Daniels*, 902 F.2d at 1240; *United States v. Macklin*, 523 F.2d 193, 195 (2d Cir. 1975); *United States v. Fein*, 504 F.2d 1170, 1173 (2d Cir. 1974); *United States v. Gillespie*, 666 F. Supp. 1137, 1138-40 (N.D. Ill. 1987). In addition, a grand jury indictment is also invalid if the grand jury's term is extended by a judge who does not have authority to grant the extension. *Daniels*, 902 F.2d at 1240. In this case, similarly, an indictment must be deemed invalid when it arises from a grand jury investigation that took place over almost a year without authorization and in violation of the Act, and that remained in violation until the very day of the indictment.

II. THE INDEPENDENT COUNSEL CANNOT RELINQUISH TO THE DEPARTMENT OF JUSTICE AUTHORITY TO PROSECUTE MATTERS WITHIN ITS CORE MANDATE.

As discussed above, the Act grants "full power" to the IC, under 28 U.S.C. § 594(a), but § 597(a) permits the IC to provide written agreement to DOJ that DOJ may continue an investigation of a matter within the IC's own prosecutorial jurisdiction. This raises a second novel issue, never addressed by this Court:

whether the IC's power to authorize DOJ to continue its own investigations is unlimited.

The legislative history clearly indicates that Congress did not view the IC as having unlimited ability to cede away its own mandate to DOJ. Instead, Congress took the position that the IC could only authorize DOJ to prosecute "peripheral" matters under § 597(a):

> there will have to be a certain amount of coordination and cooperation between a special prosecutor and the Department of Justice so that the lines of jurisdiction between the Department and the special prosecutor are clear and adequately encompass any *peripheral* matters related to the special prosecutor's jurisdiction. Therefore, while the special prosecutor may agree to permit the Department of Justice to continue to conduct certain investigations or proceedings which are *peripherally* related to the jurisdiction of the special prosecutor, *it would be a total subversion of the intent of this chapter if the special prosecutor agreed to permit the Department of Justice to conduct any important or substantial portion of the investigation under the responsibility of the special prosecutor.*

S. Rep. No. 170 at 76, 1978 U.S.C.C.A.N. at 4292 (emphasis added).

Petitioner submits that this interpretation is fully consistent with both the purpose and the language of the Act. The Act is based on the premise that certain matters cannot properly be handled by DOJ, and it therefore divests DOJ of power to prosecute them and grants the IC "full power and independent authority to exercise all investigative and prosecutorial functions" as to "all matters" in its prosecutorial jurisdiction, § 594(a), including the power to handle "all aspects of any case" within its mandate, § 594(a)(9). Therefore, the appointment of

an IC represents the conclusion that matters clearly within the IC's mandate are not appropriate for resolution by DOJ.

If, however, the IC is permitted to cede authority to DOJ as to matters clearly within its mandate, it could divest itself of its "full power" and lose the ability to "exercise . . . investigative and prosecutorial functions and powers," and lose any ability to exercise discretion, as to matters contained in its mandate. As discussed in Section I above, if DOJ is permitted to continue prosecuting within the IC's mandate, DOJ would be able to obtain the entry of judgments against targets of the IC's investigation for offenses arising out of the same facts that the IC is charged with investigating — thus depriving the IC of the "full power" granted to it, and therefore preventing it from "exercising [its] functions and powers" and from fulfilling its mandate. By the same token, unless there are some limits on the IC's ability to authorize DOJ investigations, the IC could effectively divest itself of its "prosecutorial jurisdiction" and power by authorizing DOJ prosecutions that would cover important parts or even the entire field of its mandate.[3]

Moreover, the only basis for *any* power by the IC to authorize DOJ investigations is that contained in 28 U.S.C. § 597(a). However, § 597(a) is expressly subordinated to § 594(a), which governs "[n]otwithstanding any other provision of law." Therefore, § 597(a) must be interpreted consistently with the grant of "full power" contained in § 594(a), and cannot

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[3] When the IC authorizes a DOJ investigation to continue, it does not constitute a "delegation," or an instance where DOJ, at the IC's request, merely provides "the *use* of the resources and personnel necessary to perform [the IC's] duties," which is permitted by § 594(d)(1); in those cases, the IC would retain control and supervisory power over DOJ. By contrast, authorizing a separate DOJ prosecution within the IC's mandate deprives the IC of its ability to exercise discretion as to that matter, because it enables DOJ, as an authorized prosecutorial agency, to take irrevocable action with regard to the matter.

be invoked in support of an attempt to undermine or cut off that power.

Furthermore, § 597(a) does not purport to address which investigations the IC can authorize, and, as discussed above, the Act's purpose would be frustrated if it were interpreted to permit the IC to cede its entire investigation back to DOJ — or, as the legislative history states, "any important or substantial portion of the investigation." The Act's grant of "full power" should be read consistently with the legislative history, to permit only the authorization of DOJ investigations that are "peripheral" to the IC's mandate. One way of determining whether a matter is "peripheral" is whether a DOJ prosecution could result in a conviction arising out of facts clearly within the IC's mandate, and that would bar a further IC prosecution based on those facts.

In this case, the investigation and indictment at issue were clearly not "peripheral" but were squarely within the IC's mandate. App. A-97, A-99. The IC's mandate included the authority to investigate HUD's administration of the UDAG program and any crimes committed by officials of HUD or other persons relating to the UDAG program, App. A-59 to A-60, and Gilliam was "at the center of the alleged criminal activities" that the IC was charged with investigating, App. A-3. DOJ's investigation and indictment related precisely to HUD's administration of the UDAG program and to gratuities provided to Gilliam — a high-ranking HUD official — in connection with that program. App. A-87, A-88.

Thus, the indictment was clearly within the core of the IC's mandate, and the IC was not therefore free to divest itself of "full power to exercise all investigative and prosecutorial functions" as to that matter. Thus, for reasons similar to those addressed in Section I above, the indictment was invalid, because DOJ was not and could not be authorized to investigate or prosecute the case.

III. IN A PROSECUTION UNDER THE GRATUITIES STATUTE, THE DEFENDANT MUST BE INFORMED WHAT THE GRATUITIES WERE AND WHEN THEY WERE GIVEN, OFFERED, OR PROMISED.

This case also raises the important issue, never decided by this Court, as to the notice that the Government is required to give in a gratuities prosecution under 18 U.S.C. § 201(c)(1). The court below affirmed Petitioner's conviction even though (1) the indictment did not specify what gratuities were given, offered, or promised, or in what amounts, App. A-87, A-88; (2) the indictment did not provide any specificity as to the time in which the gratuities were given, offered, or promised, but instead alleged a two-year period on one count and a nearly three-year period on the other count (with a confusing one and one-half-year overlap between the two counts), App. A-87, A-88; and (3) despite repeated requests and motions by Petitioner, no bill of particulars was ever provided to specify the gratuities or the times at which they were made, App. A-36, A-40, A-53 to A-57. Petitioner submits that this failed to apprise him with reasonable certainty of the nature of the accusation, contrary to the Fifth and Sixth Amendments to the United States Constitution, to Federal Rule of Criminal Procedure 7(c)(1), and to this Court's holding in *Russell v. United States*, 369 U.S. 749 (1962). Indeed, to this very day, Petitioner does not know what conduct constituted the offenses for which he has been convicted.

The Sixth Amendment requires that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." In addition, Fed. R. Crim. P. 7(c)(1) requires that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." This Court has held that an indictment must "first, contain[] the elements of the offense charged and fairly inform[] a defendant

of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). While an indictment may be pleaded in the words of the statute where the statute unambiguously sets forth all of the elements of the offense, "'it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.'" *Id.* at 117-18 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)).

In *Russell v. United States*, 369 U.S. 749 (1962), the Court held that when an issue "is central to every prosecution under the statute [and] [w]here guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Id.* at 764, *quoted in Hamling*, 418 U.S. at 118. *Russell* involved prosecutions under 2 U.S.C. § 192, which prohibited individuals from refusing to answer questions in Congressional hearings when those questions were pertinent to the Congressional inquiry. The indictments in *Russell* set forth the precise questions which the defendants had refused to answer, along with the time and place of the hearings, but the Court held that "the very core of criminality" under the statute was "pertinency to the subject under inquiry," 369 U.S. at 765, and the indictment was therefore required to set forth the subject under inquiry as well. As a result, under the Fifth and Sixth Amendments and Fed. R. Crim. P. 7(c)(1), the indictments failed to apprise the defendants with reasonable certainty of the nature of the charges against them. *Id.* at 765-66.

The deficiencies of the indictment in this case — where the indictment pled unspecified "gratuities" given, offered, or promised within periods of two to three years — are far more egregious than those in *Russell*, where the indictment had pled the specific questions asked and the date and place of the

hearings. Petitioner submits that, under *Russell*, he was not provided adequate notice because his indictment failed to set forth what the alleged gratuities were (instead merely alleging "money [in unspecified amounts] and other things of value," App. A-87, A-88), and when they were given, offered, or promised; the failure to do so is especially inexcusable in light of the fact that allegations of "gratuities" naturally lend themselves to exact particulars as to what was given, offered, or promised, and when. The essence of a violation of the gratuities statute is the providing, offering, or promising of a specific thing of value — in other words, a gratuity — yet the indictment failed to apprise Petitioner of what the thing of value was or even when it was provided, offered, or promised, even though "guilt depends so crucially upon such a specific identification of fact." *Russell*, 369 U.S. at 764.

A fortiori, the failure to provide a bill of particulars, despite two motions by Petitioner, App. A-40, A-53 to A-57, violated Petitioner's rights. Indeed, *Russell* indicates that even a bill of particulars would have been insufficient: the Court made clear that "it is a settled rule that a bill of particulars cannot save an invalid indictment," because it would permit a defendant to "be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 369 U.S. at 770. In any event, the denial of a bill of particulars denied Petitioner the notice necessary to apprise him of the nature of the charges against him or to permit him to prepare his defense.

Events at trial further proved the importance of providing adequate notice of what gratuities a defendant is alleged to have given, offered, or promised, and when. At trial, the Government put on extensive testimony by Gilliam as to many different alleged payments or arrangements that the Government or the grand jury may or may not have considered to be gratuities, including a loan of money to a third party (Gilliam's father) in return for a promissory note, a loan of money to Gilliam, and

"promises" of payments outside of the statute of limitations. App. A-103 to A-127, A-129 to A-173. To this date, it is unclear which of these many allegations the grand jury had in mind when it issued the indictment; which of these allegations the Government itself considered to be gratuities; which of the allegations provided the basis for the petit jury's decision; whether (in light of the fact that the two counts overlapped in time) the same conduct was the basis for both convictions; or whether the conduct occurred before or after the Sentencing Guidelines went into effect. Petitioner submits that this cannot comport with the requirement that he "be informed of the nature and cause of the accusation" against him. U.S. Const., amend. VI.

A further instance of the importance of providing "the essential facts" in the indictment, Fed. R. Crim. P. 7(c)(1), or at least through a bill of particulars, is that, while the Government claimed that discovery materials it provided contained adequate notice, the discovery actually affirmatively misled Petitioner, because it included a "bribe book" that Gilliam had created (apparently, during the investigation) in which he purportedly listed all of the payments he had received; however, at trial, Gilliam testified as to numerous additional payments that had not been contained in the "bribe book." App. A-122 to A-125, A-129 to A-130, A-133 to A-134. Thus, the discovery, if anything, actually exacerbated the lack of notice to Petitioner. Moreover, even if, as *Russell* holds, a bill of particulars is an inadequate substitute for particularized allegations, *a fortiori* the Government cannot simply provide a collection of documents and expect the defendant to find "a needle in a haystack" (or, more accurately, "an unspecified item or items in a haystack"). This is especially true in a situation involving a statute, such as the gratuities statute, which contemplates the giving, offering, or providing of a specific thing at a specific time.

In this case, as in *Russell*,

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.

369 U.S. at 766. Obviously, these problems are only increased when the defendant is also denied a bill of particulars. Consequently, Petitioner respectfully submits that he was not provided notice in accordance with the Sixth Amendment and Fed. R. Crim. P. 7(c)(1); that he was prejudiced because he was unable to determine the "essential facts" of the offenses — what the gratuities were, and when they were given, offered, or promised — and was surprised at trial by allegations as to which he received no notice; and that his conviction must therefore be overturned.

CONCLUSION

The petition for a writ of certioriari should be granted.

Respectfully submitted,

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January 17, 1995

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Lance Henry WILSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Leonard E. BRISCOE, Sr.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Maurice David STEIER,
Defendant-Appellant.

Nos. 93-3053 to 93-3055
United States Court of Appeals,
District of Columbia Circuit.

Argued April 6, 1994.
Decided June 17, 1994.
As Amended June 17, 1994.

Appeal from the United States District Court for the District of Columbia (Criminal Nos. 91cr00399-02, 92cr00086-01 and 92cr00086-02).

Barry W. Levine argued the cause, for appellant Briscoe. With him on the briefs were Elaine Metlin and David B. Killalea.

Theodore V. Wells, Jr., of the bar of the U.S. Court of Appeals for the Third Circuit, pro hac vice, by special leave of the Court, argued the cause, for appellant Wilson. With him on the briefs were Martha P. Rogers and Robert L. Krakower.

Maurice David Steier argued and filed briefs pro se.

Bruce C. Swartz, Deputy Independent Counsel, argued the cause for appellee. With him on the brief were Arlin M. Adams, Independent Counsel, Roscoe C. Howard, Jr., Ltd. and Dianne J. Smith, Associate Independent Counsels, and Eric H. Holder, Jr., U.S. Atty.

Before WALD, EDWARDS, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

This case arose out of an investigation into abuses and mismanagement at the Department of Housing and Urban Development ("HUD") initiated by Congress in 1989. In March 1990, on petition of the Attorney General, a special division of this court appointed an independent counsel pursuant to the Ethics in Government Act of 1978 ("Ethics Act" or "Act"), § 601(a), as amended, 28 U.S.C. § 593(b) (1988), to pursue the investigation. At the close of the investigation, defendants were prosecuted for involvement in an alleged bribery and kickback scheme to obtain HUD Urban Development Action Grants ("UDAGs") for real estate developments in Florida and Texas. Appellants were acquitted on all but the illegal gratuities counts, 18 U.S.C. § 201(c)(1)(A), which are now challenged on appeal. For reasons stated below, we reverse the conviction of Lance Henry Wilson because the illegal gratuity charge was brought more than five years after his commission of the alleged offense and was thus time barred under the applicable statute of limita-

tions, 18 U.S.C. § 3282, which defendant Wilson had not waived. After a searching review of appellant Briscoe's and appellant Steier's many challenges, we affirm their convictions, addressing in detail only those contentions we believe merit elaboration.

I. BACKGROUND

In 1989, after Congress had conducted hearings on alleged abuses and mismanagement at HUD, the Attorney General, acting pursuant to the Ethics Act, § 601(a), as amended, 28 U.S.C. § 592(c), "appl[ied] to the division of [this] court for the appointment of an independent counsel." *Cf. Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (upholding constitutionality of independent counsel provisions). On March 1, 1990, the special division granted the Attorney General's application and several months later expanded the independent counsel's investigative and prosecutorial jurisdiction to cover any federal criminal violations committed by Housing Secretary Samuel R. Pierce, Jr., or others in relation to, *inter alia,* the administration of the UDAG program, as well as any "additional matters related to the [i]ndependent [c]ounsel's prosecutorial jurisdiction referred to[i]dependent [c]ounsel by the Attorney General." *In re Samuel R. Pierce, Jr.* at 2 (D.C.Cir.Sp.Div. No. 89-5 July 1, 1990).

DuBois Gilliam, the former Deputy Assistant Secretary for Program and Policy Development and Evaluation at HUD, who was at the center of the alleged criminal activities, testified before Congress pursuant to a grant of immunity. On May 31, 1990, he agreed to cooperate with the office of the Independent Counsel ("OIC"), and one month later he further agreed to cooperate with the U.S. Attorney for the Southern District of Florida ("USAO") who had been conducting an investigation into local corruption involving Florida and Texas real estate developer Leonard E. Briscoe. Gilliam alleged that, while he was at HUD, he accepted false "firm financial commitment letters" prepared by Lance Henry Wilson of Paine-Webber, Inc.

who had previously been Secretary Pierce's Executive Assistant. These letters would attest that the private developer, *i.e.*, Leonard E. Briscoe, had secured a firm private commitment to finance and carry out the proposed UDAG project prior to preliminary HUD approval. Without evidence of such a financial commitment for any given project, HUD would not approve UDAG matching funds.

According to the government, representatives of the OIC and the Florida USAO met in July, 1990, and decided to coordinate their investigative efforts. The Florida USAO would continue its ongoing examination of alleged illegal activities centered around Briscoe's Florida activities, while the OIC would focus on the scheme to obtain UDAG funds with the help of false firm financial commitment letters.

As the investigation in the Southern District of Florida finalized, it became clear that forthcoming indictments would overlap considerably with the subject matter of the OIC's jurisdiction. On June 12, 1991, the OIC authorized the USAO in writing to seek the contemplated indictments. That same day the Florida U.S. Attorney obtained two indictments, the first charging a kickback scheme with a local contractor (not at issue here) and the second charging that Briscoe and his attorney M. David Steier had conspired to bribe and provide illegal gratuities to DuBois Gilliam to obtain approval for UDAG funding for three Florida projects, the Wedgewood Plaza Apartments, Wedgewood Plaza Mall, and Palm Glade Apartments, in violation of 18 U.S.C. §§ 2, 201(b)(1)(A), 201(b)(1)(B), 201(c)(1)(A) & 371.

Barely one month later in Washington, D.C., the OIC sought its first indictment of Briscoe charging various crimes in connection with the firm financial commitment letters for the Wedgewood Plaza Mall project. This indictment, however, was to be superseded three times. On November 21, 1991, the District of Columbia grand jury returned the first superseding indictment against Briscoe, adding charges relating to a project

in Ft. Worth, Texas, known as Overton Ridge. On January 14, 1992, the D.C. grand jury returned a second superseding indictment adding charges in connection with the Palm Glade project and naming Lance Wilson as a defendant for the first time. The second superseding indictment charged Wilson for the first time with conspiracy and illegal gratuity. (Briscoe was alleged to have participated in, but was not indicted for the conspiracy with Wilson.) Two weeks later, Leonard Briscoe, without objection by his co-defendant Steier, successfully moved to transfer both Florida cases to the District of Columbia.

Finally, on May 19, 1992, the D.C. grand jury returned a third superseding indictment, adding Brisco and Steier to the conspiracy count. Shortly thereafter, the government successfully moved to consolidate the OIC and Florida indictments and set them down for trial.

The government's case was built on the theory that beginning in 1985, Gilliam (an unindicted co-conspirator) agreed to accept false firm financial commitment letters prepared by Wilson, then at PaineWebber. Gilliam would make certain that HUD awarded UDAG funds (sometimes in excess of HUD staff estimates) to the projects developed by Briscoe. Attorney Steier allegedly set up a company, "Northwest Investment Corporation," for the purposes of surreptitiously funneling illegal payments from Briscoe to Gilliam.

After a three month jury trial Briscoe was convicted on the two illegal gratuity counts which originated in the Florida USAO indictment and was acquitted on all other counts; Wilson was convicted on one illegal gratuity count which first appeared in the OIC's second superseding indictment and acquitted of the remaining 21 counts; Steier was convicted of one illegal gratuity count originating in the Florida indictment and acquitted of the remaining five charges in which he was named as a defendant. This appeal followed.

II. ANALYSIS

A. *Challenge Under the Ethics in Government Act*

The Ethics in Government Act, § 601(a), 28 U.S.C. § 597(a), provides:

> Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matters, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

Although the OIC for this case was established in March 1990, it was not until over fourteen months later, on the same day the Florida indictment was obtained, that the OIC for the first time authorized in writing the USAO's "investigation and, if appropriate, prosecution of . . . a possible conspiracy among Leonard Briscoe, David Steier, and others to bribe a government official, DuBois Gilliam." Letter from Arlin M. Adams, Independent Counsel, to Dexter W. Lehtinen, Office of the United States Attorney for the Southern District of Florida (June 12, 1991). Briscoe and Steier argue that, as a result, the Florida investigation was never duly authorized and the subsequent indictment was fatally flawed.

Appellants contend further that even if the written authorization of June 12, 1991, was not untimely, the OIC was not empowered to authorize a simultaneous investigation by the Department of Justice ("DOJ") that was anything more than peripherally related to the central matter within the jurisdiction of the OIC. Relying solely on a passage from the legislative history of the Ethics Act, they maintain that the Act would be

frustrated by permitting the USAO to continue an investigation which substantially overlaps with the OIC's jurisdiction. They quote the Senate Report on Ethics Act which noted that "it would be a total subversion of the intent of this chapter if the special prosecutor agreed to permit the Department of Justice to conduct any important or substantial portion of the investigation under the responsibility of the special prosecutor." S.REP. NO. 170, 95th Cong., 1st Sess. 76(1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4292. *See* Brief for Appellant Briscoe at 10-11. In a related vein, they charge that the subsequent consolidation of the Florida and D.C. indictments for joint prosecution by the OIC and the DOJ also served to undermine the independence of the special prosecutor in violation of the Ethics Act.

Briscoe and Steier do not allege any specific harm incurred as a result of these events other than the fact of being indicted and convicted on the charges originating in the Florida indictment. They do not, for example, allege that the dual investigations effectively deprived them of defense resources, such as access to witnesses or other evidence, which Briscoe and Steier would have enjoyed in the absence of parallel investigations.[1] Nor do appellants allege that the Florida USAO lacked the requisite authorization from within the DOJ to conduct the Florida grand jury proceedings. *See, e.g.*, 28 U.S.C. §515(a); *cf. United States v. Prueitt,* 540 F.2d 995 (9th Cir.1976), *cert. denied,* 429 U.S. 1063, 97 S.Ct. 790, 50 L.Ed.2d 780 (1977) (discussing standard for evaluating whether Attorney General

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[1] According to 28 U.S.C. § 594(f), the independent counsel "shall, except where not possible, comply with the . . . policies of the [DOJ] respecting enforcement of the criminal laws." These policies provided guidance on such subjects as "dual prosecution, granting of immunity to witnesses, and other important matters respecting enforcement of criminal laws," and are "important in ensuring that there is some degree of uniformity and fairness of treatment involved in all prosecutions brought by the executive branch of the federal government." S.REP.NO. 170, 95th Cong., 1st Sess. at 69, 1978 U.S.C.C.A.N. at 4285. As the Act makes clear, the special prosecutor must consider these guidelines, but is not bound to follow them.

has provided requisite appointment and direction under § 515(a)). The core of their claim is rather that upon appointment of the OIC, § 597(a) *withdrew* any authority the Florida USAO otherwise had to investigate and conduct grand jury proceedings regarding possible criminal activities involving Leonard Briscoe, and that, as a result, notwithstanding the OIC's written authorization on June 12, 1991, to legitimize the Florida indictments they are nonetheless fatally flawed. We reject that contention.

The central purpose of the special prosecutor provisions of the Ethics Act is to permit the effective investigation and prosecution of high level government and campaign officials. S.REP. NO. 170, 95th Cong., 1st Sess. at 5-7, 1978 U.S.C.C.A.N. at 4221-23. Accordingly, the Ethics Act provides a special division of this court with power to vest the prosecutorial authority of the United States in individuals who are beyond the sphere of presidential influence, and who are unencumbered by any conflicts of interest that might be expected to plague a DOJ attorney prosecuting his superiors. However, merely anointing a prosecutor from outside the incumbent Administration's realm of power obviously would not suffice to ensure that the independent prosecutor can effectively pursue his investigation. To shore up the special prosecutor's independence from the DOJ, then, the Act specifically requires the DOJ to "suspend all investigations and proceedings regarding such matter[s]" that have been assigned to the special prosecutor. As we recognized in *In re Sealed Case,* 829 F.2d 50, 56 (D.C. Cir. 1987), *cert. denied,* 484 U.S. 1027, 108 S.Ct. 753, 98 L.Ed.2d 765 (1988), the principal aim of this provision is to "prevent[] investigations by the Department of Justice which would duplicate and possibly impede the work of Independent Counsel."

As reflected in the structure of the Act, the precise allocation of responsibility over every facet of the ensuing investigation cannot be chiseled in stone at the commencement of the

special prosecutor's tenure. For example, upon application of the Attorney General to a special division of this court, it is the duty of that division to appoint and define the prosecutorial jurisdiction of the independent prosecutor. 28 U.S.C. § 593(b)(1). In defining the independent prosecutor's jurisdiction, the special division may include "all matters related to" the "subject matter with respect to which the Attorney General has requested the appointment of the independent counsel." *Id.* at § 593(b)(3). The special prosecutor may quite sensibly be authorized to investigate any potential co-conspirators of high level officials, even though they are not themselves Administration or campaign officials. *See also* S.REP. NO. 170, 95th Cong., 1st Sess. at 64, 1978 U.S.C.C.A.N. at 4280. Clearly, then, the scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders.

Since the relationship between ongoing DOJ investigations and OIC inquiries may not be apparent from the very beginning of any given investigation, the Act provides a mechanism through which the OIC and the DOJ may clarify and fine-tune their respective jurisdictions. 28 U.S.C. § 594(e). The special prosecutor and the Attorney General may reassign matters to each other, and the Act does not require the intervention by the special division to effectuate mutually accepted reshuffling of investigative responsibilities. As the Senate Report noted:

> [T]he special prosecutor may conclude that it is necessary to handle a criminal investigation which the special prosecutor has been assigned *in conjunction with other ongoing criminal investigations being handled by the Department of Justice.* Therefore, i[t] is particularly appropriate that the special prosecutor have the authority to ask the Attorney General or the division of court to assign related matters to the special prosecutor . . . [T]here will have to be coordination between the special prosecutor and the Attorney

> General to sort out the jurisdiction of the special prosecutor as it relates to the *ongoing investigations* of the Department of Justice. If these adjustments require the referral of related matters from the Department of Justice to a special prosecutor, there is no need to involve the division of the court other than to inform the division of the court that such an arrangement has been reached. The other side of this necessary cooperation will take place under subsection 597(a) which permits the special prosecutor to agree in writing that certain portions of the investigations assigned to him by the division of the court continue to be conducted by the Department of Justice.

S.REP. NO. 170, 95th Cong., 1st Sess. a 69, 1978 U.S.C.C.A.N. at 4285 (emphasis added). Given such a contemplated rearrangement of jurisdiction, we cannot accept the notion that temporary uncertainties or even overlaps in the division of jurisdiction between the DOJ and the OIC automatically invalidate all investigations or prosecutions that were commenced before the distribution of jurisdiction is finally settled in writing.

The potential scope of the special prosecutor's initial jurisdiction in this case was vast, including investigation of "whether [former HUD Secretary] Pierce, . . . other officials of the department, and *other individuals and entities*, may have committed, from 1984 through 1988 inclusive, the crime of conspiracy to defraud the United States or *any other federal crimes* relating to [the administration of several HUD programs]." *In re Samuel R. Pierce, Jr.* at 1-2 (D.C. Cir. Sp. Div. No. 89-5 July 1, 1990) (emphasis added). Accordingly, it is unsurprising that the determination whether any given individual's actions were within the special prosecutor's jurisdiction was no simple task. The only clear target of the investigation specified in the court order was Secretary Pierce himself. Evidently, the OIC believed

that prior to the USAO's request for an indictment, the Florida investigation into local corruption had not yet emerged as duplicative of the OIC's investigation so as to warrant the OIC's assertion of jurisdiction.

In addition to the simple fact that the OIC itself may not have anticipated precisely where DOJ's investigation of local corruption involving Briscoe would end up, the grand jury process leading up to indictments also provided another source of uncertainly. Time and again, the Supreme Court has recognized that in grand jury proceedings, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *United States v. Dionisio,* 410 U.S. 1, 13 n. 12, 93 S.Ct. 764, 771 n. 12, 35 L.Ed.2d 67 (1973) (quoting *Hendricks v. United States,* 223 U.S. 178, 184, 32 S.Ct. 313, 316, 56 L.Ed. 394 (1912)). *See also Blair v. United States,* 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919); *In re Grand Jury Proceedings (U.S. Steel-Clairton Works),* 525 F.2d 151, 157 (3d Cir.1975) ("At that nascent stage of the grand jury's inquiry, the lower court could not possibly predict whether indictments would issue, or, if issued, against whom and for what violations."). Indeed, even after the OIC issued written permission to the DOJ to seek the indictments and after the grand jury returned the indictments, Briscoe contended (in his original opposition to consolidation) that the Florida and D.C. indictments did not arise out of the "same acts or transactions." Joint Appendix ("J.A.") 276, 278 n.12.

In the face of such uncertainties, and given that the government prosecutors were at all times authorized by their respective superiors to conduct the grand jury proceedings at issue, that the special prosecutor exercises broad discretion to employ the resources and personnel of the DOJ,[2] and that the indictment

[2] Pursuant to § 594(d)(1), the special prosecutor may "use . . . the [DOJ] resources and personnel necessary to perform such independent counsel's duties."

itself was authorized in writing, the shift of jurisdiction from the Attorney General to the special prosecutor contemplated by §597(a) does not create any fundamental defect that "goes to the very existence of the grand jury itself," or to the indictment it produces. *United States v. Fein,* 504 F.2d 1170, 1173 (2d Cir.1974) (dismissing indictment because grand jury's authority had expired). Nothing in the language, structure, or purpose of the Ethics Act indicates that courts should strike down every indictment that originates in DOJ investigations commenced prior to formal approval by the OIC.

In other words, where prior to the appointment of a special prosecutor DOJ had authorized and commenced a grand jury investigation, a subsequent turn of events that results in the DOJ investigation encompassing matters within the jurisdiction of the special prosecutor does not in itself deprive the DOJ-run investigation up to that point of its validity *so long as* the special prosecutor promptly authorizes in writing the continuation of that investigation or its culmination in indictments. Certainly as in the case, where neither the OIC nor the DOJ complains of one another's trespass onto its "turf," and where the defendants can point to no injury from the simultaneity of the proceedings, we decline to penalize the OIC's initial decision that the Florida investigation was not sufficiently duplicative of its own, as to require at an earlier point formal, written authorization to proceed.

Appellants additionally charge that under the Act, the OIC was not empowered to authorize the USAO to obtain the Florida indictment, or to consolidate the Florida and D.C. indictments for joint prosecution by the OIC and the DOJ. To be sure, the principal aim of the independent counsel provisions is to guard the court-appointed prosecutor from undue influence by the Administration in general and the DOJ in particular. *See In re Sealed Case,* 829 F.2d at 56. Appellants are therefore accurate in asserting that it would subvert the purpose of the Act to permit

the special prosecutor, once appointed, to hand the essential parts of his investigation back to the DOJ. But we have no such situation here; there has been no surrender of responsibility as to principal facets of the OIC investigation. The OIC's own subsequent investigation, indictments, and prosecution attest to the fact.[3] Short of significant abdication of responsibility for its investigative charge, the Act permits and indeed contemplates substantial cooperation between the OIC and the DOJ. The Act entrusts the OIC with making the decision as to just how high a wall of separation between it and the DOJ must be erected.

For example, the Ethics Act grants the OIC,

> full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 [relating to wiretaps].

28 U.S.C. § 594(a). This grant of plenary power, however, nowhere requires that the OIC exercise that power in complete isolation from the DOJ. Indeed, as a lesser included power, the Act specifically contemplates that the OIC may "*participat[e]* in court proceedings . . . that such independent counsel considers necessary," and which presumably are being conducted by regular DOJ personnel. *Id.* at § 594(a)(2) (emphasis added). Moreover, §§ 594(d) and 597(a) expressly empower the OIC to "request assistance from the Department of Justice in carrying

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[3] Generally, of course, the Act does not charge this court with policing the quality of the independent prosecutor's investigative efforts. It is the Attorney General, and she alone who may remove the independent prosecutor "and only for good cause." 28 U.S.C. § 596(a)(1). *See also Morrison v. Olson*, 487 U.S. 654, 682, 108 S.Ct. 2597, 2614, 101 L.Ed.2d 569 (1988).

out the functions of the independent counsel." The statutory language does not place any substantive limit on the type of assistance rendered by the DOJ, but freely permits the OIC to "use . . . the [DOJ] resources and personnel necessary to perform [its] duties." *Id.* at § 594(d)(1). Finally, the Act contemplates that the independent counsel may "consult[ ] with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred." *Id.* at § 594(a)(10). In sum, written permission for the USAO to seek the Florida indictment, subsequent consolidation with the D.C. indictment, and joint prosecution of both indictments by the OIC are prosecutorial strategies that the OIC has full authority to follow.

Of course where the DOJ is called upon to assist with matters within the OIC's jurisdiction, the OIC will retain ultimate control of tactical decisionmaking. For example, where the Attorney General sought a stay of prosecution in an OIC matter, our trial court ordered that "[o]nly[i]ndependent [c]ounsel will be recognized as responsible for the day-to-day conduct of this case in the United States District Court." *United States v. North*, 713 F.Supp. 1441, 1442 (D.D.C. 1989). Similarly, in a case in which "the Department of Justice has been working in concert both with the national intelligence agencies and with independent counsel to ensure that national security secrets are safeguarded" and in which "the Attorney General has participated in framing both the initial charges and the substitution proposals," the Fourth Circuit found that the OIC nonetheless retained the exclusive power to appeal a trial court ruling on the admissibility of classified information. *United States v. Fernandez*, 887 F.2d 465, 467 (4th Cir. 1989). In short, while the independent counsel remains firmly in the driver's seat of any investigation or prosecution within his court-designated jurisdiction, the Ethics Act in no way prohibits him from exercising his authority in cooperation with the DOJ as he has done here.

B. *Venue, Joinder and Prosecutorial Vindictiveness*

Appellants argue next that consolidation of the Florida and D.C. indictments violated their constitutional venue rights and that the third superseding indictment was motivated by prosecutorial vindictiveness directed at Briscoe for having successfully transferred the Florida prosecution to D.C. We do not credit either of these contentions.

1. *Venue*

The Constitution guarantees criminal defendants the right to be tried in the state and district in which the alleged crime was committed. U.S. CONST. Art. III, § 2, cl. 3 & amend. VI. It has long been settled in this circuit and elsewhere, however, that a defendant may waive his right to proper venue. *Jones v. Gasch,* 404 F.2d 1231, 1235 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029, 88 S.Ct. 1414, 20 L.Ed.2d 286 (1968). *See also Singer v. United States,* 380 U.S. 24, 35, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965) (dictim). Upon defendant Briscoe's own motion and in the notable absence of any objection by defendant Steier, the Florida case was transferred to the District of Columbia pursuant to FED.R.CRIM.P. 21(b). *United States v. Briscoe et al.,* No. 91-8066 (S.D.Fla. Jan.30, 1992) (J.A. 189). As we observed in *Jones,* "[t]he constitutional rationale for these [transfer] procedures [including Rule 21(b)] was the accused's waiver, by his motion for the transfer, of his right to trial where the offense allegedly occurred." 404 F.2d at 1235. *See also* 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 306, p. 221 (2d Ed. 1982) ("Certainly a defendant has made a knowing waiver if he . . . moves for transfer to an otherwise improper venue under Rule 21."). It seems to us beyond doubt that appellant Briscoe by initiating the move to transfer to D.C. waived any subsequent objections based on improper venue.

Of course, one defendant's motion cannot, by itself, work another defendant's knowing waiver of a privilege. *See United*

States v. Stratton, 649 F.2d 1066, 1076-79 (5th Cir.1981). Rule 21(b) provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding *as to that defendant* or any one or more of the counts thereof to another district.

FED.R.CRIM.P. 21(b) (emphasis added). Since Steier did not formally join Briscoe's transfer motion, then, it was arguably error for the district court to transfer the proceeding as to *both* defendants from Florida to the District of Columbia. Here, however, "the particular facts and circumstances surrounding th[is] case, including the background, experience, and conduct of the accused" lead us to conclude that Steier, too, waived his venue objections. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Not only did the Florida district court note Steier's silence in its transfer order, but *after* Steier's case was transferred to D.C., Steier affirmatively represented to the D.C. trial court that he had no objections to the transfer. In his memorandum opposing consolidation of the Florida and D.C. indictments filed in June, 1992, Steier made clear that he objected to consolidation in the trial court *not* because venue in D.C. was improper, but because of the prejudice that consolidation would cause him at trial. *See* Memorandum in Support of Defendant Maurice David Steier's Opposition to Consolidation of Trials, *United States v. Briscoe et al.*, No. 91-399 at 18 (D.D.C. filed June 4, 1992). Steier explicitly proclaimed in that memorandum to the district court: "[i]t is important to note that Mr. Steier was fully prepared to go to trial in Florida as well as in the District of Columbia." *Id.* at 17-18. In other words, Steier on his own accord affirmatively represented to the trial court that he was ready and willing to stand trial in the District of Columbia.

While "'courts indulge every reasonable presumption against waiver,' of fundamental constitutional rights," *Johnson*, 304 U.S. at 464, 58 S.Ct. at 1023 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937)), we must conclude that both Briscoe and Steier waived their venue right in the course of the proceedings below. We consequently refuse to consider the merits of their claim that the Florida indictment "does not allege a sufficient nexus with the District of Columbia to establish venue."

2. *Prosecutorial Conduct in Obtaining the Third Superseding Indictment*

Briscoe and Steier argue that the OIC abused the grand jury process and was motivated by prosecutorial vindictiveness when it sought the third superseding indictment from the D.C. grand jury and subsequently moved for consolidation. They maintain that upon transfer of the DOJ's Florida indictment to the District of Columbia, that indictment could not have been joined with the OIC's then-pending second superseding indictment because while the former indicted Briscoe and Steier as co-conspirators, the latter did not. They contend that the OIC returned to the grand jury to obtain the third superseding indictment (which finally did indict Briscoe and Steier as co-conspirators) "[a]s a transparent stratagem to cure this problem," thereby abusing the grand jury process. Brief for Appellant Briscoe at 15. Finally, they charge that the third superseding indictment "'up[ped] the ante'" in an illicit attempt to penalize Briscoe for lawfully exercising his right to transfer. *Id.* at 16 (quoting *Blackledge v. Perry*, 417 U.S. 21, 28, 94 S.Ct. 2098, 2102-03, 40 L.Ed.2d 628 (1974)). We disagree.

As an initial matter, defendants fail entirely to point to caselaw or other authority prohibiting a prosecutor from seeking a superseding indictment in order to cure procedural defects of the first one. More important, however, we agree with the trial court that "consolidation of the *second* superseding indictment

[and the Florida indictment, once transferred to D.C.,] would have been appropriate." *United States v. Briscoe et al.*, 1992 WL 207943, *5 n. 9, No. 91-399 at 7 n.9 (D.D.C. Aug. 14, 1992) (emphasis added).

According to Rule 13 of the Federal Rules of Criminal Procedure, "[t]he court may order two or more indictments . . . to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment." The joinder of multiple defendants in a single indictment is governed by the following rule:

> Two or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

FED.R.CRIM.P. 8(b).[4] The First Circuit's pragmatic explanation of the benefits of joinder is particularly apt here:

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[4] Rule 8(b) governs joinder of multiple defendants. Rule 8(a), on the other hand, sets forth the requirements for joinder of multiple offenses:

> Two or more offenses may be charged in the same indictment . . . in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituing parts of a common scheme or plan.

While Rules 8(a) *and* 8(b) might be thought to apply in cases where multiple defendants *and* multiple offenses are involved, we have repeatedly refused to concede that Rule 8(a) has any application when the issue concerns the proper joinder of multiple defendants. In cases involving multiple defendants, "the weight of authority in this circuit and elsewhere regards Rule 8(b) as providing the sole standard for determining the permissibility of joinder of offenses." *United States v. Jackson*, 562 F.2d 789, 793 (D.C. Cir.1977). *See also United States v. Halliman*, 923 F.2d 873, 883 (D.C. Cir. 1991); *United States v. Perry*, 731 F.2d 985, 989 (D.C. Cir. 1984).

> Classic examples of such a benefit are when there is an overlapping of issues, as for example, when some defendants are charged with transporting stolen goods in interstate commerce and others are charged with receiving the goods, so stolen and transported, or when defendants are charged with conspiracy to conceal a crime that part of their number are charged with committing. Where, however, there are no presumptive benefits from joint proof of facts relevant to all the acts or transactions, there is no "series," Rule 8(b) comes to an end, and joinder is impermissible.

United States v. Jackson, 562 F.2d 789, 794-95 (D.C. Cir. 1977) (quoting *King v. United States*, 355 F.2d 700, 704 (1st Cir.1966)).

In determining whether joinder of multiple defendants in a single prosecution is proper, this circuit permits a trial court to consult the indictment as well as any other pretrial evidence offered by the government. *United States v. Halliman*, 923 F.2d 873, 883 (D.C. Cir. 1991); *United States v. Perry*, 731 F.2d 985, 990 (D.C. Cir.1984) ("[A] demonstration of the necessary relationship[between joined offenses]—and hence the benefit to the court of joinder—may be made by the Government at *some time before trial*." (emphasis in original)).[5] In this case, however, the indictment alone provides sufficient support to uphold a joinder of the DOJ indictment which originated in Florida and *either* the second superseding or the third superseding indictment.

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[5] Other circuits have required the government to demonstrate the propriety of joinder on the face of the indictment, *i.e.*, without recourse to other pretrial evidence extraneous to the indictment. *See United States v. Kaufman*, 858 F.2d 994, 1003 (5th Cir. 1988); *United States v. Grey Bear*, 863 F.2d 572, 576 (8th Cir. 1988) (en banc) (per curiam) (equally divided court), *cert. denied*, 493 U.S. 1047, 110 S.Ct. 846, 107 L.Ed.2d 840 (1990); *United States v. Bledsoe*, 674 F.2d 647, 655 (8th Cir.), *cert. denied*, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982); *United States v. Morales*, 868 F.2d 1562, 1567 (11th Cir.1989).

Although Steier was not indicted in the second superseding indictment, he was an unindicted co-conspirator who was alleged to have set up the Northwest Investment Company and other corporations "that would be used to conceal the payment, receipt and expenditure of money given to DuBois Gilliam for his oversight of UDAG projects at HUD." *United States v. Wilson et al.*, No.91-0399 at ¶ 35 (D.D.C. Jan. 14, 1992) (second superseding indictment). *See also id.* at ¶¶ 19, 21 & 27. The second superseding indictment alleged that Steier would receive payments from Leonard Briscoe for DuBois Gilliam "in the guise of payments for legal work purportedly performed by . . . Steier," *id.* at ¶ 36, and it alleged numerous specific acts committed by Steier in furtherance of the described scheme, *id.* at ¶¶ 47, 51, 52, 54 & 60. The main purpose of the conspiracy alleged in the second superseding indictment was to secure UDAG funds for Briscoe's projects by illegal means. *Id.* at ¶ 28. The Florida indictment which had been obtained earlier by the DOJ, of course alleged virtually the identical purpose when describing the conspiracy among Briscoe and Steier and alleging specific offenses for which they were being indicted. *United States v. Briscoe et al.*, No. 91-8066 (S.D.Fla. Jul. 12, 1991) (J.A. 109). Therefore, after the Florida indictment was transferred to the District of Columbia it could well have been consolidated with the second superseding indictment, since the two alleged "'acts . . . [that were] connected together or constitute[ed] parts of a common scheme or plan.'" *Perry*, 731 F.2d at 990 (quoting *Jackson*, 562 F.2d at 796 (citation omitted)). *Cf. id.* ("there must be a logical relationship between the acts"). In other words, the OIC would not have had to return to the grand jury after the Florida indictment was transferred to D.C. in order to secure consolidation. It could have joined the DOJ and the OIC prosecutions on the basis of the then-existing second superseding indictment.

If consolidation of the Florida indictment with the second superseding indictment would have been proper, *a fortiori* con-

solidation with the third superseding indictment can be upheld. Since the third superseding indictment is no narrower in scope or less specific in allegation of individual acts than the second superseding indictment, we must agree with the trial court that consolidation of the third superseding indictment with the Florida indictment was proper. *See United States v. Briscoe et al.*, No. 91-399 (D.D.C. May 19, 1992) (third superseding indictment).

Finally, appellants' charges that the third superseding indictment was motivated by prosecutorial vindictiveness in retaliation for the defendants' having exercised their lawful right to transfer to D.C. are wholly unfounded. In its memorandum in support of consolidation, the OIC informed the court of its intention, if the Florida indictment were consolidated with the third superseding indictment, to move at the appropriate time to dismiss the Florida conspiracy count so that only one conspiracy count against Briscoe and Steier would go to the jury. J.A. 268-69. That is precisely what happened at trial. In sum, because the OIC had no reason to penalize the exercise of the defendants' right to transfer and indeed took the initiative to ensure that Briscoe and Steier could only be convicted on one conspiracy count, we find a distinct absence of any "realistic likelihood of 'vindictiveness'" involved in the prosecution of this case. *Blackledge v. Perry*, 417 U.S. 21, 27, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974).

C. *Wilson's Waiver of the Statute of Limitations*

Lance H. Wilson was convicted on the final count in the third superseding indictment, which charged that "[o]n or about September 20, 1986," Wilson provided illegal gratuities to "DuBois Gilliam, for and because of official acts performed and to be performed by said public official . . . concerning applications for Urban Development Action Grants" in violation of 18 U.S.C. §201(c)(1)(A). *United States v. Briscoe et al.*, No. 91-399 at 54 (count 30) (D.D.C. May 19, 1992). Wilson did not

deny at trial that he paid for Gilliam and his wife to spend a weekend in New York on the date mentioned. However, the first indictment charging Wilson with this offense was returned on January 14, 1992, more than five years after September 20, 1986. *See United States v. Wilson et al.,* No. 91-0399 at 51 (count 24) (D.D.C. Jan. 14, 1992). The government readily admits that this count would be time barred in the absence of Wilson's waiver of the applicable statute of limitations which provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed.

18 U.S.C. § 3282. As the Supreme Court explained in *Toussie v. United States,* 397 U.S. 112, 114-15, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970):

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

See also WAYNE R. LAFAVE & JEROLD H. ISRAEL, 2 CRIMINAL PROCEDURE § 18.5(a), pp. 423-24 (1984) (quoting *Toussie* and noting other purposes of time bar).

The government locates Wilson's waiver of the time bar in a series of letters written by his attorneys on his behalf to the OIC. Although Wilson does not deny that the letters were written on his behalf, he argues that their content and the circumstances surrounding their issuance do not permit an inference of waiver. He contends that the letters waive the statute of limitations only for specified events which do not include the alleged September 20th gratuity, that he never signed the letters himself, and that he never discussed with his attorneys waiving the time bar with respect to the September 20th New York trip and "certainly had not authorized them to do so." Brief for Appellant Wilson at 18.

Prior to trial, Wilson moved for dismissal of the gratuity count on time bar grounds and, after denial of his initial motion, unsuccessfully sought reconsideration. The trial court accepted the fact that Wilson had never discussed with his attorneys waiving the statute of limitations as to the gratuity count. Nonetheless, the trial court likened a waiver to a contract and, in examining the objective manifestations of the parties' intent, found sufficient evidence that the "broad waivers of the statute of limitations executed by counsel for defendant Wilson amounted to a knowing and intelligent waiver of the statute of limitations encompassed in [the gratuity count] of the indictment." J.A. 366-67. Wilson objects not only to the trial court's legal analysis of waiver of a statutory right interims of ordinary contract principles but argues in addition that even if the letters are viewed as the objective manifestations of Wilson's intent, they evince an exclusion rather than inclusion of the gratuity count from the scope of his intended waivers.

Since *United States v. Wild*, 551 F.2d 418 (D.C.Cir.1977), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed.2d 226 (1977), the settled law in our circuit has been that a criminal statute of limitations is not jurisdictional in nature and therefore can be waived. In *Wild*, we held that the statute of limitations

had been waived "where . . . the defendant followed the advice of competent counsel and executed an express written waiver prior to the expiration of the statute of limitations." 551 F.2d at 419. We reasoned in that case:

> [I]f a defendant may waive certain constitutional rights, he should certainly be capable in this instance of waiving a statutory right such as the statute of limitations.[6] . . . If the strong policies behind these [constitutional] rights are not violated by a rule permitting them to be waived by a defendant, we cannot find that the limitation statute's policy is violated here where the *defendant was fully cognizant of the consequences of such a waiver and decided to execute it on the advice of his attorney for his own benefit.*

Wild, 551 F.2d at 424-25 (emphasis added). While in *Wild* we contemplated that an "implicit agreement" may in certain circumstances be sufficient to waive the time bar, 551 F.2d at 423, we had no occasion to probe the necessary requirements of implied waivers since the waiver there had been made expressly. Nonetheless the reasoning of that decision ultimately rested on the fact that the defendant had waived the time bar voluntarily, intelligently, and knowingly so that the purposes of the time bar were fully preserved.[7] *Cf. United States v. Levine*, 658 F.2d 113, 120-21 (3d Cir.1981) ("It is also possible for a defendant knowingly and intelligently to waive the statute of limitations, thus sanctioning a later indictment which, absent such a waiver, would be untimely."); *id.* at 124 n. 17 ("Because waivers of

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[6] The statute of limitations which is concerned with pre-indictment delay does not ordinarily rise to the level of a constitutional speedy trial right under the Sixth Amendment. *See United States v. Marion*, 404 U.S. 307, 92 S.Ct 455, 30 L.Ed.2d 468 (1971); *Wild*, 551 F.2d at 423.

[7] Since the alleged waiver in this case is not an open-ended one, we need not be concerned with questions of whether the defendant was "prosecuted within a reasonable length of time" or has sustained "prejudice resulting from the [untoward] delay." *Wild*, 551 F.2d at 425.

limitations statutes, similar to guilty pleas, involve the relinquishment of important rights, it has been held that they should also be made with the advice of counsel and informed by an understanding of the consequences of waiver."); *United States v. Heidecke,* 900 F.2d 1155 (7th Cir. 1990) (finding waiver to have been made knowingly and voluntarily); *United States v. Meeker,* 701 F.2d 685 (7th Cir.), *cert. denied,* 464 U.S. 826, 104 S.Ct. 96, 78 L.Ed.2d 102 (1983) ("The purposes of a time bar are not offended by a knowing and voluntary waiver of the defense by the defendant."(footnote omitted)); *United States v. Caldwell,* 859 F.2d 805, 806 (9th Cir. 1988), *cert. denied,* 489 U.S. 1039, 109 S.Ct. 1173, 103 L.Ed.2d 235) (1989) ("Thus, unless other lines of caselaw or public policy concerns compel a different result, the standard for acceptance of a waiver of the statute of limitations should be the same as the standard in other waiver contexts, *i.e.,* whether the waiver was knowing and voluntary." (citing *Wild,* 551 F.2d at 424-25)).

Inquiring, then, whether Wilson's waiver was made knowingly, voluntarily, and intelligently, we turn first to the letters written on Wilson's behalf by his attorneys to the OIC. Only if these clearly encompass a waiver of the September 20th gratuity, need we ask further whether the letters can support a finding of waiver despite the fact that Wilson never signed the letters and that, as the trial court readily accepted, his attorneys had never spoken to Wilson specifically about waiving the September 20th gratuity.[8]

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[8] The OIC, for example, likens a waiver of the limitation ban to an individual's consent to a car search where the "standard for measuring the scope of a suspects's consent . . . is that of 'objective' reasonableness." *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991). In so doing, the OIC overlooks the Supreme Court's admonition that "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it

The OIC first contacted Wilson on July 9, 1991, in connection with "activities involving the Wedgewood Plaza Mall UDAG" for which the "statute might run on July 15, 1991." J.A. 153. Apparently July 15, 1991, would have marked the fifth anniversary of Wilson's filing of the firm commitment letter for the Wedgewood Plaza Mall UDAG with HUD, and it was solely in this context that Wilson's attorneys discussed the waiver with the defendant. Since the government did not obtain a waiver from Wilson personally, Wilson's counsel replied on July 11, 1991, that Wilson

> agree[d] that the statute [of limitations] will be tolled for a 90-day period commencing on July 14, 1991 and ending on October 15, 1991. That period of time will be excluded from the calculation of any limitations period within which any charges concerning this [Wedgewood Plaza Mall] UDAG may be filed.[9]

J.A. 155. While this was the most broadly-worded concession in any of the cited letters, the 90-day period it covers actually expired before the January 14, 1992 indictment of Wilson on the gratuity charges.[10]

On September 23, 1991, the OIC wrote to Wilson requesting an extension of the waiver. The reply letter by Wilson's attorneys noted that Wilson would waive the statute of limita-

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ought to be extended to the constitutional guarantee against unreasonable searches and seizures." *Schneckloth v. Bustamonte*, 412 U.S. 218, 241, 93 S.Ct. 2041, 2055, 36 L.Ed.2d 854 (1973).

[9] The letter make clear, "[h]owever, [that] the statute of limitations will not be waived with regard to any other offenses as to which the statute would be a bar as of July 14, 1991." J.A. 155. All subsequent letters contain identically phrased limitations of the waiver. *See* J.A. 165 & 173.

[10] Even if the statute of limitations for the September 20th gratuity was tolled for 90 days by this waiver, time for prosecuting the offense would have expired on December 19, 1991, *i.e.*, five years plus 90 days after September 20, 1991.

tions "for an additional 60-day period" only "with respect to the July 15, 1986 *commitment letter* for the Wedgewood Plaza Mall UDAG . . . [and] charges *directly involving* that matter." J.A. 165 (emphasis added).

On October 31, 1991, shortly before the fifth anniversary of the commitment letter Wilson submitted for the Overton Ridge project, the OIC requested Wilson to waive the statute of limitations "on the Overton Ridge Project as he has for the earlier indictment." J.A. 171. Again, counsel for Wilson discussed waiver with him solely with respect to the commitment letter, and Wilson submitted a waiver tolling the statute for a 60-day period "with respect to the issuance of the November 25, 1986 *commitment letter* for the Overton Ridge Development UDAG . . . [and] charges *directly involving* that matter." J.A. 173 (emphasis added).

Finally, on November 21, 1991, the OIC requested that Wilson synchronize the statutory periods of the executed waivers, Wilson's attorneys once again discussed the matter with him exclusively in terms of the commitments letters, and the attorneys wrote to the OIC on December 4, 1991, that Wilson would waive the statute "with respect to the issuance of the July 15, 1986 *commitment letter* for Wedgewood Mall . . . [and] any charges *directly involving* the Wedgewood Mall commitment letter." J.A. 177 (emphasis added). None of the requests for a waiver and none of the waivers made reference to any acts on September 20, 1986, the date on which Wilson was found to have provided the illegal gratuity.

1. *The Trial Court's Failure to Present to the Jury the Issue of the Relationship Between the Gratuity and the Commitment Letters*

Even assuming that the time bar for a gratuity that "directly involv[ed]" the Overton Ridge or the Wedgewood Plaza Mall commitment letters was validly waived by the written concessions, the illegal gratuity represented by the New York trip would not necessarily fall within the scope of that waiver. According to the government's evidence at trial, Gilliam ordered his staff to fund the Wedgewood Plaza *Apartments* (as opposed to the Mall) in December, 1985. In subsequent conversations and meetings around March and April, 1986, Gilliam and Briscoe allegedly agreed to cooperate and secure UDAGs for future projects, beginning with the Wedgewood Plaza *Mall.* In late April, Wilson allegedly invited Gilliam to New York and the trip was consummated on September 20, 1986, shortly after Gillaim had accepted a firm financial commitment letter leading to the funding of the Mall project that August. According to the government, after the New York trip, Briscoe sought funding for the Overton Ridge project, Gilliam again accepted a false firm commitment letter from Wilson, but funding for the project never materialized and the project eventually died.

While it is, of course, always *possible* that the September 20th gratuity was meant to reward Gilliam for the Wedgewood Plaza Mall and Overton Ridge UDAGs, it could just as well have been provided exclusively in connection with the Wedgewood Plaza *Apartments* or other official duties not involving the acceptance of the firm financial commitment letters. In short, the government was never required to prove at trial that the illegal gratuity directly involved the two commitment letters which are specifically addressed in the written waivers executed by Wilson's attorneys. Thus, were we like the trial judge to rely entirely upon the language of the letters in order to determine the scope of the intended waiver (and disregard the fact that

Wilson never spoke to his attorneys about waiving anything beyond the submission of the firm commitment letters themselves), we would still be compelled to find that the commitment letters described as the subject of the waiver might have but need not have "directly involv[ed]" the illegal gratuity on September 20, 1991—that nexus if it existed was one which had to be established by evidence extraneous to the letters.

When prosecution of a defendant proceeds on one theory of the case, but would be time barred on any other, the jury may be presented with two options: either find the defendant guilty on the theory permitting prosecution, or acquit the defendant. *See Grunewald v. United States,* 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). *Grunewald* involved convictions for a conspiracy to obtain "no prosecution" rulings from the Internal Revenue Service in order to shield certain taxpayers from tax liability. The Court held that it was "incumbent on the [g]overnment to prove that the conspiracy . . . was still in existence [during the limitations period] and that at least one overt act in furtherance of the conspiracy was performed [during that time]." *Id.* at 396, 77 S.Ct. at 970. Since the "no prosecution" rulings had all been obtained outside the limitations period, petitioners contended that the prosecution was barred by the statute of limitations. The government, however, argued that the convictions could be sustained on the theory that the conspiracy was really one of shielding taxpayers from any liability, including criminal tax prosecution which could have been brought for several years *after* obtaining the "no prosecution" rulings.[11] On this view, the conspiracy continued until the threat of prosecution for tax evasion had passed, thereby extending criminal activity well into the limitations period. The Court agreed that on this theory the conspiracy would not have been barred by the statute of limitations and that the evidence in the case indeed

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[11] Because of the governing six year statute of limitations on tax prosecution cases, the potential for prosecution of the original tax evasion would cease after six years of evasion. 353 U.S. at 406 & n. 19, 77 S.Ct. at 975 & n. 19.

would have permitted the jury to "infer . . . that the conspirators were prepared and had agreed to engage in further frauds and bribery if necessary in order to maintain in effect the tentative rulings obtained [outside the limitations period]" until the threat of prosecution subsided. *Id.* at 410, 77 S.Ct. at 977. But this theory was not properly charged and nothing indicated that the jury found this extended conspiracy to have taken place. The instructions would equally have permitted the jury to convict solely based on the more limited, time-barred conspiracy to obtain the "no prosecution" rulings. The Court concluded that "[s]ince, under the judge's charge, the convictions . . . might have rested on an impermissible ground . . . they cannot stand." *Id.* at 415, 77 S.Ct. at 979.

Similarly, the Eleventh Circuit held that a trial court could not refuse to charge the jury with determining that the offense was committed during the limitations period. *United States v. Edwards,* 968 F.2d 1148 (11th Cir. 1992), *cert. denied,* —U.S.—, 113 S.Ct. 1006, 122 L.Ed.2d 155 (1993). "[O]nce . . . conflicting evidence [is] presented [on the limitations issue,] the question of whether the [g]overnment instituted the prosecution . . . in a timely manner bec[omes] an issue for the jury to determine." *Id.* at 1153. At that point, the jury must be "properly instructed [to] determine whether the . . . offense occurred [outside of the limitations period]." *Id. See also United States v. Alfonso-Perez,* 535 F.2d 1362 (2d Cir.1976); *cf. United States v. Perholtz,* 842 F.2d 343, 364-65 (D.C.Cir.), *cert. denied,* 488 U.S. 821, 109 S.Ct. 65, 102 L.Ed.2d 42 (1988) (jury was properly charged to find that defendants caused the mailing of documents authorizing the payment of funds in connection with the illegal scheme; "Since the mailings that clearly furthered the scheme to defraud occurred within five years of the date of the indictment, the mail fraud prosecution is not time barred."*Id.* at 365.). Since the jury that convicted Wilson was never made aware of the requirement that the illegal gratuity be connected to the Wedgewood Plaza Mall or the

Overton Ridge commitment letters in order to fall within the time bar, we have no way of knowing whether it convicted Wilson for a gratuity that was time barred or for the one that was arguable within the scope of his waiver. *Cf. Allred v. United States,* 146 F.2d 193, 195 (9th Cir. 1944) (unnecessary to show that crime was committed on exact date mentioned in indictment, where "[t]he evidence showed . . . that the crime was committed (if committed at all) within [the limitations period].").

2. *Wilson's Failure to Request a Proper Jury Instruction*

Ordinarily where a case goes forward on a theory which places the offense within the limitations period, it is incumbent upon the defendant at the close of the trial to request a jury instruction requiring that his guilt be determined solely in terms of conduct not barred by the applicable statute of limitations. *See, e.g., Alfonso-Perez,* 535 F.2d at 1364 (requesting instruction); *see generally* FED.R.CRIM.P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."); *United States v. Tarantino,* 846 F.2d 1384, 1401 (D.C. Cir.), *cert. denied,* 488 U.S. 840, 109 S.Ct. 108, 102 L.Ed.2d 83 (1988) (reviewing jury instructions to which defendant failed to object only for plain error). Accordingly, in cases where the defendant failed to request a jury instruction limited to the theory on which prosecution of the offense was not time barred, courts have declined to consider challenges to the jury charge on appeal. *See United States v. Walsh,* 928 F.2d 7, 12 (1st Cir. 1991); *United States v. Cianchetti,* 315 F.2d 584, 589 (2d Cir. 1963). Nonetheless, we believe in the instant situation that the unconditional and final nature of the district court's pretrial ruling relieved Wilson of any obligation to reiterate his limitations concerns at the time when the jury was instructed.

Under FED.R.CRIM.P. 12 defenses which are "capable of determination without the trial of the general issues may be raised before trial by motion." *Id.* at 12(b). Pretrial motions, such as a motion to dismiss a prosecution as time barred, "shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue." *Id.* at 12(e). "[G]ood cause" exists, and indeed a decision on a motion should be deferred, if disposing of the motion involves deciding issues of fact that are inevitably bound up with evidence about the alleged offense itself. "If a pretrial claim is 'substantially founded upon and intertwined with' evidence concerning the alleged offense, the motion falls within the province of the ultimate finder of fact and must be deferred." *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452, (9th Cir.)(quoting *United States v. Williams*, 644 F.2d 950, 952-53 (2d Cir.1981)), *cert. denied,* 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986). *See also* 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 193, p.708 (2D ED.1982) ("If [the statute of limitations defense] is raised by motion to dismiss, the court has discretion . . . when to determine it . . . . If . . . factual matters are involved, such as when a conspiracy ended or when an offense was consummated, the limitations question should be put off until the trial."); *id.* at § 194; *United States v. Stone,* 444 F.Supp. 1254, 1256 (E.D.Wis.), *aff'd*, 588 F.2d 834 (7th Cir.1978) (affirmative defense of withdrawal from the charged conspiracy outside the limitations period could not be determined pretrial because the government might succeed in proving at trial that the defendant committed an overt act in furtherance of the conspiracy within the limitations period).

In the case at hand, the issue of whether the gratuity was directly related to the acceptance of the two commitment letters for which the time bar had been waived was just such a fact inextricably interwoven with the evidence about the commission of the offense itself. To be sure, Wilson's motion to dismiss

concentrated on the challenge that since he had never discussed waiving the time bar with respect to anything other than the submission of the commitment letters themselves, the waiver could not be construed to extend to *anything* beyond the two commitment letters that were discussed in his written relinquishment of the time bar. But the government's response focussed on how to interpret the scope of the written waivers assuming the fact that they might constitute a broader concession than the specific discussions between Wilson and his attorneys may have suggested. The government argued in response to Wilson's motion to dismiss the indictment that *"[t]he evidence at trial will show* that the only reason Mr. Wilson provided a gratuity to... Gilliam was to insure the latter's assistance in shepherding through HUD the PaineWebber commitment letters Gilliam knew to be fraudulent." J.A. 325 (emphasis added). Reading, as we think it reasonable to do, the government's reference to the "commitment letters" as relating exclusively to the two commitment letters that were the subject of Wilson's waiver, the trial court was alerted to the evidentiary nexus which still had to be proved at trial. As a result, the court should properly have deferred final judgment on the motion to dismiss until after trial when all the evidence concerning the relationship between the gratuity and the commitment letters had been introduced. The trial court, in other words, should have declined to dismiss the indictment before trial and permit the government to prove at trial that the gratuity was truly related to the relevant commitment letters while at the same time making it clear that the government was required to make that connection. Had the trial court done so, the defendant, of course, would have had to renew his objection at trial and request that the jury be charged with determining whether the government had borne its burden of proof in establishing the connection between the gratuity and the Overton Ridge and Wedgewood Plaza Mall commitment letters.

Here, however, the trial judge's pretrial ruling on the motion to dismiss was a definitive and sweeping one which rendered futile any later attempts by the defendant to resurrect the time bar objection. The pretrial ruling totally absolved the government of its burden at trial of having to demonstrate any connection between the gratuity and the two non-time-barred commitment letters. In the original order, the court tersely held "that the waivers of the statute of limitations executed by defendant Wilson *encompassed the conduct alleged* in Count 30 [the illegal gratuity count] of the indictment. Therefore, defendant Wilson's knowing and intelligent waiver of the statute of limitations encompassed that count as well as the others." J.A. 334 (emphasis added). Count 30 of the indictment, however, indicted Wilson for having provided an illegal gratuity "[o]n or about September 20, 1986, . . . to . . . Gilliam, for and because of official acts performed and to be performed by said public official . . . concerning applications for [UDAGs]." *United States v. Briscoe et al.*, 91-399 at 54 (count 30) (D.D.C. May 19, 1992).

The court, in effect, construed the waiver as encompassing no limitation at all on the relationship between the gratuity for which Wilson could be convicted under count 30 and any particular commitment letters. There was no discussion in his opinion of evidence or theories which the government expected to prove at trial, or any suggestion that the government would need to muster particularized evidentiary support at trial in support of the determination that the gratuity fell within the scope for the waiver. When the court affirmed its original order on reconsideration, the reasoning was equally categorical. With no hint of any *factual* link *vel non* between the commitment letters referenced in Wilson's written waiver and the gratuity, the court unequivocally reiterated:

> [T]he waivers drafted by defendant Wilson's counsel [are] *sufficiently broad and sweeping to encompass*

> *that conduct* [*i.e.* the gratuity charge] . . . . [T]he Court finds that the broad waivers of the statute of limitations executed by counsel for defendant Wilson amounted to a *knowing and intelligent waiver of the statute of limitations encompassed in Count 30* [the gratuity count] of the indictment.

J.A. 366-67 (emphasis added). In other words, the court unconditionally held that the waiver encompassed any illegal gratuity that would fall under count 30 of the indictment, and the trial court's decision was in no manner contingent upon factual support to be adduced by the government at trial showing a nexus with particular commitment letters or a subsequent jury finding to that effect. This reading of the waiver letters was obviously overly broad.

We believe that under these circumstances, where the trial court had explicitly and definitively settled the scope of the waiver issue prior to trial, thereby excluding it wholesale from the trial process, it would have been senseless for the defendant to argue at the close of the trial that the relation between the gratuity and the commitment letters was an undecided matter of fact to be presented to the jury.

To sum up, the district court at most was entitled to decide pretrial that the illegal gratuity prosecution could proceed *insofar* as it directly involved the Wedgewood Plaza Mall and Overton Ridge commitment letters. However, by deciding prior to trial that Wilson had waived the statute of limitations with respect to the gratuity count in its entirety, the trial judge effectively exempted the government from demonstrating at trial and the jury from deciding that the gratuity truly related to the letters referenced in the written waivers. The jury, then, may well have decided that the New York trip constituted an illegal gratuity but that it did not directly involve either the Wedgewood Plaza Mall or the Overton Ridge commitment letters and instead represented an unlawful reward for the Wedgewood Plaza

Apartment funding or the performance of some other official act. As a result, even assuming that Wilson's attorneys validly waived the statute of limitations for Wilson with respect to the commitment letters and any charges directly involving the letters, we have no way of knowing whether the jury convicted Wilson for a gratuity that directly involved these letters or a time-barred gratuity that did not directly relate to these letters. Because, then, the jury may have convicted Wilson on an impermissible ground, the conviction cannot stand.

D. *Remaining Challenges*

We have carefully reviewed the remainder of appellants' challenges and find them meritless; we see no need to discuss them in detail here. We note, however, that contrary to the OIC's assertion, Steier did raise an objection to instructing the jury on the lesser included illegal gratuity charge along with the greater offense of bribery. *See* J.A. 1589. Nonetheless, we have no difficulty finding on the facts of this case that all the elements "for the . . . prosecution . . . to be entitled to a lesser included offense charge" over defendant's objection were satisfied, including the requirements that the jury could "consistently [have found] the defendant innocent of the greater and guilty of the lesser included offense." *United States v. Brewster*, 506 F.2d 62, 70-71 (D.C. Cir. 1974) (quoting *United States v. Whitaker*, 447 F.2d 314, 317 (D.C. Cir. 1971)). *See also United States v. Harary*, 457 F.2d 471, 478 (2d Cir. 1972). The jury, for example could consistently have found (and in this case did find) that Steier provided gratuities "otherwise than as provided by law for the proper discharge of official duty" in violation of 18 U.S.C. § 201(c)(1), but without the requisite "corrupt[]" intent which would constitute bribery under 18 U.S.C. § 201(b)(1).

On the basis of applicable law and the facts of this case, we also find no reason to overturn the district court's denial of bills of particular to Steier and Briscoe, its refusal to grant Steier's severance motion, or its denial of Briscoe's special verdict form.

Furthermore, the trial court did not err in applying the sentencing guidelines to Briscoe's conviction because the trial court could have found on the preponderance of the evidence that the gratuity involved payments after November 1, 1987. *See United States v. Dale,* 991 F.2d 819, 853-54 (D.C. Cir.1993) (sentencing guidelines apply to offenses that begin before November 1, 1987, and continue after that date; and trial court may find, on the preponderance of the evidence, that conspiracy continued after November 1, 1987, notwithstanding that jury's general verdict form did not so specify). Finally, the trial court's evidentiary rulings and its occasional curtailment of cross-examination reveal no abuse of discretion warranting reversal. A somewhat more troublesome challenge involves the objected-to admission of Secretary Pierce's statement that Briscoe was "greedy" and a "crook"; that hearsay statement was clearly prejudicial and was only marginally relevant to the asserted purpose of showing that Pierce was not—as defendants maintained—approving UDAG funding for Briscoe on affirmative action grounds. In light of the weight of the remaining evidence presented in the course of the three-month trial, however, we find the error ultimately harmless. *See Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946); *United States v. Baker, 693 F.2d 183, 189 (D.C. Cir. 1982).*

III. Conclusion

For reasons set forth, we reverse Wilson's conviction and affirm the convictions of Briscoe and Steier.[12]

It is so ordered.

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[12] We deny appellant Briscoe's and appellant Wilson's motions to strike portions of the government's brief in light of our disposition of this case which did not require consideration of the disputed material.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

LEONARD E. BRISCOE,
LANCE H. WILSON, and
MAURICE DAVID STEIER

Criminal Nos. 91-399 SSH
and 92-86 SSH

ORDER

Before the Court is defendant Briscoe's motion to dismiss the Steier indictment, as adopted by defendant Steier. The Court finds that there has been no violation of the Speedy Trial Act in connection with the indictment in *United States v. Briscoe and Steier*. For the reasons stated in the Government's opposition, fifteen non-excludable speedy trial act days had run as of January 28, 1992, the date the District Court for the Southern District of Florida granted defendant Briscoe's transfer motion. The speedy trial clock was tolled until March 17, 1992, the date this Court received all of the documents from the Florida District Court. 18 U.S.C. § 3161(h)(1)(G). The clock was further tolled between April 15, 1992, when defendant Briscoe filed his motion to modify conditions of pre-trial release, and May 15, 1992, when this Court resolved that motion. The time period between April 22, 1992, when the Government moved to consolidate, and August 7, 1992, when this Court granted that motion, also is excludable. The period between July 27, 1992 and August 13, 1992, additionally is excludable as time resulting from the resolution of the Government's motion for a booking order for defendant Steier. 18 U.S.C. § 3161 (h) (1) (F). Finally, all time between August 13 until trial is excludable due to overlapping motions by defendants. Thus only 43 speedy trial

act days have elasped between the date of defendant Steier's arraignment and the date of trial. The Court further finds that the Office of Independent Counsel's delegation of authority to the Department of Justice to investigate matters that resulted in the Steier indictment was permissible under the Ethics in Government Act, 28 U.S.C. §§ 591-98 (the "Act"). As this Court has previously found, cooperation between the Department of Justice and the Office of Independent Counsel at the initiative of the Independent Counsel does not violate the Act's purpose to prevent interference by the Department of Justice. *See United States v. Briscoe, Wilson and Steier*, No. 91-399 (D.D.C. August 14, 1992) (Opinion regarding consolidation). Accordingly, it hereby is

ORDERED, that the motion is denied.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: 9-28-92

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

LEONARD E. BRISCOE,
LANCE H. WILSON,
and
MAURICE DAVID STEIER

Criminal Nos. 91-399 SSH
and 92-86 SSH

ORDER

Before the Court is defendant Briscoe's motion for a bill of particulars, as adopted by defendants Wilson and Steier. The purpose of a bill of particulars is to inform the defendant of the charges against him with sufficient precision to allow him to understand the charges, to prepare his defense, and to be protected against retrial on the same charges. *United States v. Butler,* 822 F.2d 1191, 1193 (D.C. Cir. 1987). The Court finds that the Third Superseding Indictment is sufficiently precise to enable defendant Briscoe to prepare his defense, particularly given defendant Briscoe's repeated assertions that his defense has been prepared for over the past year. Accordingly, it hereby is

ORDERED, that the motion is denied.

SO ORDERED.

/s / Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: September 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

LEONARD E. BRISCOE, SR.
LANCE W.WILSON
MAURICE DAVID STEIER.

Criminal No. 91-399 SSH

UNITED STATES

v.

LEONARD E. BRISCOE, SR.
MAURICE DAVID STEIER.

Criminal No. 92-86 SSH

ORDER

Before the Court are the Government's motion and supplemental motion to consolidate indictments and trials. On consideration of the motions and the defendants' oppositions, the Court consolidates trial of these cases pursuant to Fed.R.Crim.P. 13. The Court soon will issue an Opinion setting forth the reasons for its decision, but issues this Order now for the parties' information. The Court also expresses its intention, absent extraordinary intervening circumstances, to adhere to the previously-set September 22, 1992, trial date. Accordingly, it hereby is

ORDERED, that *United States v. Briscoe, Wilson, and Steier*, Criminal No. 91-399, and *United States v. Briscoe and Steier*, Criminal No. 92-86, are consolidated.

SO ORDERED.

/s / Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: August 7, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

LEONARD E. BRISCOE, SR.
LANCE W.WILSON
MAURICE DAVID STEIER.

Criminal No. 91-399 SSH

UNITED STATES

v.

LEONARD E. BRISCOE, SR.
MAURICE DAVID STEIER.

Criminal No. 92-86 SSH

OPINION

Before the Court are the Government's motion and supplemental motion to consolidate indictments and trials and the defendants' opposition thereto.[1] The motions were filed jointly by the Office of Independent Counsel (OIC) and the Department of Justice (DOJ) through the United States Attorney for the District of Columbia.[2] They seek consolidation of *United States v. Briscoe, Wilson, and Steier*, Criminal No. 91-399, which was initiated here by the OIC, and *United States v. Briscoe and Steier*, Criminal No. 92-86, which originally was brought by the

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[1] The term "Government" in this case refers collectively to the Independent Counsel and the United States Attorney for the District of Columbia.

[2] The Independent Counsel in this case was appointed to investigate alleged corruption within the Department of Housing and Urban Development.

United States Attorney for the Southern District of Florida. After careful review of the entire record, the Court consolidated the two indictments for trial by Order of August 7, 1992. This Opinion sets forth the reasons for the Court's Order. Defendants opposed consolidation on a number of grounds. The Court addresses only those contentions that it considers significant.

Background

On July 11, 1991, the OIC filed an indictment against defendant Briscoe in this district, Criminal No. 91-399 (OIC indictment). The OIC subsequently filed three superseding indictments, the last of which is *United States v. Briscoe, Wilson, and Steier* (third superseding indictment). On June 12, 1991, the United States Attorney for the Southern District of Florida returned an indictment against defendants Briscoe and Steier, in that district's Criminal No. 92-8066 (the South Florida indictment). On defendant Briscoe's motion, the South Florida indictment was transferred to this District on January 28, 1992. The South Florida indictment, this Court's Criminal No. 92-86, was assigned to the undersigned as related to the OIC indictment.

Following the transfer, the OIC and the United States Attorney jointly moved to consolidate the OIC indictment with the South Florida indictment. The Government initially moved to consolidate the OIC's second superseding indictment with the South Florida indictment. Before defendants' oppositions to that motion were filed, the OIC filed the third superseding indictment, and the Government filed a supplemental motion to consolidate.

The South Florida indictment charges defendants Briscoe and Steier with three counts of bribery, three counts of paying an illegal gratuity, and conspiracy to commit those offenses.[3]

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[3] Defendants Briscoe and Steier are charged in that indictment with violating 18 U.S.C. §§ 201(b)(1)(A) & (B) and 201(c)(1)(A).

Count one of the indictment alleges that defendants conspired to provide bribery money to DuBois Gilliam, Deputy Assistant Secretary for Program Policy Development and Evaluation at HUD. (South Florida indictment at 2-6). Gilliam administered HUD's Urban Development Action Grant program (UDAG). The alleged purpose and object of the conspiracy was to obtain HUD approval under the UDAG program for various projects developed by defendant Briscoe. (*Id.* at 3-4.) The defendants allegedly disguised the payments to Gilliam as attorney's fees to Steier. Steier allegedly formed various corporations to conceal the true recipient of the payments. The six other counts of the South Florida indictment charge the defendants with bribery and paying an illegal gratuity.[4] (*Id.* at 4.)

The OIC indictment charges defendants Briscoe and Wilson with submitting false statements to HUD in connection with UDAG applications for various projects developed by Briscoe, including the projects at issue in the South Florida indictment.[5] (OIC indictment at 28-54.) For each project, Wilson, a First Vice President of a financial institution, falsely represented that his employer had issued the requisite "firm financial commitment" for the project to qualify under the UDAG program. Briscoe then represented that he accepted the financial commit-

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[4] Counts two through five charge defendants Briscoe and Steier with bribery and paying an illegal gratuity to Gilliam in connection with the Wedgewood Plaza Apartments and Wedgewood Plaza Mall projects in Riviera Beach, Florida. Counts six and seven charge defendant Briscoe with the same offenses in connection with the Palm Glade Apartments project in Belle Glade, Florida.

[5] Defendants Briscoe and Wilson allegedly submitted false statements to obtain UDAGs for Wedgewood Plaza Mall, Overton Ridge Development, and Palm Glade Apartments. The OIC indictment addresses five separate false statements and charges the defendants with three separate offenses for each one under 18 U.S.C. §§ 1001, 1010, and 1012. The OIC indictment also charges the defendants with wire fraud and mail fraud in violation of 18 U.S.C. §§ 1341 and 1343.

ment. The false statements were submitted to DuBois Gilliam at HUD to obtain UDAGs. *Id.*

The OIC indictment also charges defendants Briscoe, Wilson, and Steier with conspiracy. Count one alleges that the defendants conspired "to use illegal means to ensure that HUD would approve and award UDAG funds" to Briscoe's projects, including projects that did not qualify for HUD grants. (OIC indictment at 12, ¶ 28.) The defendants allegedly conspired to obtain HUD grants for various projects by submitting false statements to HUD and making illegal payments to DuBois Gilliam in exchange for approving the grants. The illegal payment portion of the conspiracy is the same bribery scheme alleged in the South Florida indictment. Thus, the conspiracy in the OIC indictment encompasses both the South Florida bribery charges and the false statements charges.

The OIC indictment names DuBois Gilliam as an unindicted coconspirator.[6] Both Briscoe and Steier were unindicted coconspirators in the OIC's second superseding indictment and are named as indicted coconspirators in the third superseding indictment.[7]

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[6] The indictment also names Darrell Wood, who is deceased, as an unindicted coconspirator.

[7] The conspiracy charge in the OIC's second superseding indictment also encompassed the bribery scheme charged in the South Florida indictment. Although Steier was not charged in any counts of the second superseding indictment, he was named in numerous paragraphs of the conspiracy charge which described the bribery scheme. (*See* second superseding indictment ¶¶ 19, 21, 22, 35, 36, 47, 51, 52, 54, 58, and 60.) The second superseding indictment also described Briscoe's role in the bribery portion of the conspiracy. (*See id.* ¶¶ 17, 34, 36, 46, 50, 51, 52, 53, 55, 56, and 57.) The third superseding indictment incorporated paragraphs further describing the bribery scheme from the South Florida indictment. (*Compare* third superseding indictment ¶¶ 34-39, and 44-45, *with*, South Florida indictment pp. 4-5 ¶¶ 1-7; *compare* third superseding indictment ¶¶ 57, 62, 64, 67, 68, 99, 102, and 103, *with* South Florida indictment pp. 5-7, ¶¶ 1-8.)

Discussion

Rule 13 provides that "[t]he court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information." Fed.R.Crim.P. 13. Thus, a court may consolidate indictments for trial if the offenses could be joined in a single indictment under Rule 8. *United States v. Burkley*, 591 F.2d 903, 918 (D.C.Cir.1978), *cert. denied*, 440 U.S. 966, 99 S.Ct. 1516, 59 L.Ed.2d 782 (1979); *United States v. McDaniel*, 538 F.2d 408, 411 (D.C.Cir.1976).

"Rule 8(b) governs the joinder of defendants and offenses when there are multiple defendants." *United States v. Halliman*, 923 F.2d 873, 882 (D.C.Cir.1991); *United States v. Perry*, 731 F.2d 985, 989 (D.C.Cir.1984). Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

The rule extends to offenses comprised of the "same series of acts or transactions." *Id.* That language "may not be read to embrace similar or even identical offenses, *unless* those offenses are related." *Perry*, 731 F.2d at 990. "Acts or transactions form a 'series' within the meaning of the rule if they 'constitute parts of a common scheme or plan.'" *Halliman*, 923 F.2d at 883 (quoting *Perry*, 731 F.2d at 990, and *United States v. Jackson*, 562 F.2d 789, 796 (D.C.Cir.1977)). "In other words, there must be a logical relationship between the acts or transactions within the series." *Perry*, 731 F.2d at 990.

The OIC indictment alleges on its face that the defendants participated in a common scheme or plan that included the offenses alleged in the South Florida indictment.[8] The offenses in the South Florida indictment are a subset of the overall "series of acts or transactions" in the OIC indictment. The acts within the overall series are "logically related" through a common purpose to obtain UDAG grants for projects developed by defendant Briscoe.[9] *Cf. United States v. Nicely*, 922 F.2d 850 (D.C.Cir.1991) (joinder of two conspiracies with common participants but with distinct "victims" not appropriate). Thus, joinder of the offenses in a single indictment would be appropriate under Rule 8(b). *See McDaniel*, 538 F.2d at 411.

Defendant Briscoe contends that the offenses could not have been charged in a single indictment originally because of venue problems, and therefore that consolidation is improper. The OIC has stated from the outset that no district originally had venue of both the bribery charges and the false statements charges. However, the original venue problems do not bar consolidation. Defendants Briscoe and Steier waived any objection to venue of the South Florida charges in this district

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[8] The Court may determine whether joinder is appropriate from the allegations of the indictment. *See Perry*, 731 F.2d at 990-91 (basis for joinder may be determined from the pretrial evidence if it is not apparent from the indictment).

[9] Contrary to defendants' assertions, the logical relationship between the offenses in the two indictments was apparent even on the face of the OIC's second superseding indictment. Defendants stress that the second superseding indictment did not allege that defendant Wilson "participated in any of the events described in the [South Florida] indictment." (Briscoe's Opp. at 15; *see* Wilson's Opp. at 17-18.) Thus, they argue that the third superseding indictment was obtained for the improper purpose of eliminating an obstacle to consolidation. However, the OIC's second superseding indictment alleged that Wilson participated in a conspiracy with Briscoe and Steier and that the conspiracy included the events described in the South Florida indictment. Therefore, consolidation of the second superseding indictment would have been appropriate.

through the motion to transfer.[10] Logic, fairness, and considerations of judicial economy dictate that the defendants may not now prevent an otherwise appropriate consolidation by asserting the original venue problems.[11]

The language of Rule 13 is permissive with regard to consolidation of appropriate indictments, and therefore the Court should consider the effect of consolidation on judicial economy. *Burkley*, 591 F.2d at 919. The Court also must weigh any possible prejudice to the defendants. *Id.* The Court finds that consolidation will not prejudice the defendants because evidence relating to the charges in each indictment would be admissible in a separate trial on the other.[12] Moreover, consolidation will prevent duplication of evidence, thereby conserving the resources of the Court.

Defendants contend that consolidation would violate the purpose and the specific terms of the Ethics in Government Act (Ethics Act), 28 U.S.C. §§ 591-98 (1982 & Supp.1992), under which the OIC was appointed. Defendants argue that a joint prosecution would undermine the "independence" of the Independent Counsel.

The Ethics Act is designed in part to prevent the DOJ from interfering with an independent counsel's investigation. *See United States v. Fernandez*, 887 F.2d 465, 468 (4th Cir.1989); *In re Sealed Case*, 829 F.2d 50, 56 (D.C.Cir.1987), *cert. denied*, 484 U.S. 1027, 108 S.Ct. 753, 98 L.Ed.2d 765 (1988). To that end, the Act "effects a sweeping transfer of prosecutorial and investigative authority from the Attorney General to inde-

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[10] Defendant Steier did not oppose defendant Briscoe's motion to transfer.

[11] Defendants contend that the third superseding indictment suffers additional flaws that they will address in pretrial motions. The Court does not resolve those issues, except to conclude that the alleged flaws do not bar consolidation.

[12] Defendant Steier filed a motion to sever on August 10, 1992. The Court does not resolve that motion, which is not yet at issue.

pendent counsel." *Fernandez*, 887 F.2d at 468; *see* 28 U.S.C. § 594(a). Such broad authority ensures that an independent counsel may pursue its investigation "without intervention, supervision or control by the Department of Justice." *Fernandez*, 887 F.2d at 468 (quoting S.Rep. No. 170, 95th Cong., 2d Sess. 66, *reprinted in* 1978 U.S.Code Cong. & Ad.News 4216, 4282).

The Ethics Act does not prohibit cooperation between the DOJ and an independent counsel. In fact, certain types of cooperation and consultation are expressly permitted. *See, e.g.*, 28 U.S.C. § 594(a)(10) (authorizing independent counsel to consult United States Attorney); § 594(d) (requiring DOJ to provide administrative support and to pay expenditures of independent counsel); and § 594(e) (referral of related matters). Additional cooperation between the two offices is consistent with an independent counsel's broad authority under the Act. *See In re Sealed Case*, 829 F.2d at 56. Furthermore, cooperation at the initiative of an independent counsel does not violate the Act's purpose to prevent interference by the DOJ.[13]

Defendants contend that consolidation would violate § 597(a) of the Act which requires the DOJ to suspend any investigation into a matter within an independent counsel's mandate. That section provides:

> Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel . . . the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all

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[13] The OIC contends that defendants do not have "standing" to assert that consolidation would impinge on its independence from the DOJ. The Court of Appeals reached the merits of an objection similar to defendants without addressing standing in *In re Sealed Case*, 829 F.2d at 55-56. The Court concludes that defendants have standing under the Ethics Act to object a violation of the autonomy of the OIC.

> investigations and proceedings regarding such matter except to the extent required by subsection 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

Id. § 597(a).

Citing the legislative history of the section, defendants contend that it prohibits an independent counsel from delegating any important or substantial portion of its investigation to the DOJ under any circumstances. *See* S.Rep. No. 170, 95th Cong. 2d Sess., *reprinted in* 1978 U.S.Code Cong. and Admin.News 4284, 4292. The Court of Appeals for this Circuit has stated that the purpose of § 597(a) is "preventing investigations by the Department of Justice which would duplicate and possibly impede the work of the Independent Counsel." *In re Sealed Case*, 829 F.2d at 56. In that case, the Court of Appeals held that a parallel appointment to the Iran/Contra independent counsel from the Attorney General did not violate § 597(a). The court specifically noted that the parallel appointment made the Iran/Contra independent counsel an office "within" the Department of Justice. *Id.* Nevertheless, the court upheld the parallel appointment because the independent counsel remained "free of ongoing supervision by the Attorney General." *Id.*

On the facts before the Court, a joint prosecution on the two indictments is comparable to the parallel appointment in the Iran/Contra investigation. Consolidating the South Florida indictment with the OIC indictment for trial will require the OIC and the DOJ to cooperate, but it will not subject the OIC to the supervision or control of the DOJ.[14] A joint prosecution will not reduce the OIC's autonomy or its prosecutorial authority. Therefore, consolidating the indictments will not violate the Ethics Act.

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[14] The Court expects the OIC and the United States Attorney to coordinate their trial effort so that the case may proceed smoothly. Such coordination does not require the OIC to submit to the supervision of the DOJ.

Conclusion

The Ethics Act does not bar a joint prosecution of the OIC indictment and the South Florida indictment. The OIC indictment alleges that defendants Briscoe, Wilson, and Steier participated in a series of acts or transactions constituting a common scheme. The alleged scheme includes the offenses charged in the South Florida indictment against defendants Briscoe and Steier. Accordingly, the Court concludes that the offenses in the two indictments are logically related and that consolidation is appropriate under Rule 13. Finding that a joint trial would conserve substantial judicial resources, the Court consolidates the indictments for trial.

/s / Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: August 14, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

vs.

LEONARD BRISCOE and
MAURICE DAVID STEIER,

Defendants.

CASE NO. 91-8066-Cr-PAINE

ORDER ON DEFENDANT BRISCOE'S MOTION FOR BILL OF PARTICULARS

THIS CAUSE is before the Court on defendant Briscoe's Motion for Bill of Particulars and was referred to United States Magistrate Judge Barry S. Seltzer. For the reasons set forth below, defendant Briscoe's Motion for Bill of Particulars is hereby DENIED as to each and every request.

Defendant Leonard Briscoe is charged by way of a seven (7) count Indictment with violations of federal conspiracy, bribery and gratuity laws. Count I charges Briscoe and codefendant Maurice David Steier with a conspiracy to bribe former HUD Deputy Secretary DuBois Gilliam. Counts II thru VII are substantive bribery and gratuity charges, alleging misconduct with respect to the three (3) projects referenced in the Introduction: Wedgewood Plaza Apartments (Count II and III); Wedgewood Plaza Mall (Counts IV and V); and, Palm Glade Apartments (Counts VI and VII).

Briscoe seeks an order directing the United States to file a Bill of Particulars relative to each of the allegations contained in the Indictment. Concerning the conspiracy count, Briscoe requests disclosure of the following information; the identity of

appropriate function of a Bill of Particulars and is not a proper purpose in seeking the Bill." *Id.* at 1441.

The Eleventh Circuit has offered guidance concerning the sufficiency of detail in a charging document. In *United States v. Warren*, 772 F.2d 827 (11th Cir.), *cert. denied* 475 U.S. 1022 (1985), the court affirmed the trial judge's denial of a request for a Bill of Particulars where the Indictment was found to contain sufficient detail from which the defendant could prepare his defense. The court observed that

> [t]he Indictment set out in detail the terms of the conspiracy, ten overt acts, and the substantive charges against the appellants, providing them adequate notice of the charges and a full and fair opportunity to prepare their defenses. In addition, the Government provided appellants with a list of unindicted co-conspirators.

Id at 837.

Review of the instant Indictment reveals sufficient detail to permit the defendant adequately to prepare his case, to avoid surprise at trial and to protect against double jeopardy. The Indictment commences with an "Introduction to All Counts", setting forth the purpose of the UDAG program, the nature of defendant Briscoe's and defendant Steier's businesses, the identity of pertinent companies controlled by Steier, the official capacity within which DuBois Gilliam acted, and the identity of the particular projects that are the subject of the alleged misconduct. This introduction is followed by a conspiracy count, further subdivided into sections detailing the alleged offenses. In seven paragraphs under the heading "Manner and Means by Which the all conspirators now known to the Government; the locations where the conspiracy was carried out; the dates and places where each conspirator joined the scheme; the identity of any businesses which were part of the conspiracy; the identity of gifts or other things of value allegedly given by Leonard

Briscoe to DuBois Gilliam; the identity of each official act influenced as a result of such gift; the identify of all favorable terms and conditions of any UDAG grant agreement obtained as a result of the conspiracy; and, the details of any additional overt act which the Government intends to present at trial and which is not set forth in the Indictment. With regard to the substantive charges of misconduct (Counts II thru VII), the motion seeks the precise dates of the alleged misconduct, as well as the particular manner in which the defendant is claimed to have interfered with an HUD function. Finally, the defendant seeks a definition of the terms "deceit, craft, dishonesty, misrepresentation, and overreaching."

The purpose of a Bill of Particulars is to inform the defendant of the charges against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense.[1] *United States v. Anderson,* 799 F.2d 1438, (11th Cir.) *reh. denied* 805 F.2d 1043, *cert. denied* 480 U.S. 931 (1986). "General discovery, however, is not an Conspiracy was Carried Out," the Government elaborates upon its theory of prosecution, setting forth the purpose of the conspiracy and the manner in which the bribery monies were allegedly paid. In a subsection entitled "Overt Acts", the Government lists eight (8) acts committed in furtherance of the conspiracy and, with regard to each, provides the pertinent dates, places and participants. Though the specifics provided are not of the detail sought by the defense, the Government is not required to provide all facts regarding the existence and formation of a conspiracy, or the details of all overt acts that might be proved at trial, or the names of unindicted co-conspirators. *See United States v. Rosenthal,* 793 F.2d 1214, 1227 (11th Cir.), *modified in part* 801 F.2d 378, *cert. denied* 480 U.S. 919 (1986);

[1] The Federal Rules of Criminal Procedure speak briefly as to the propriety of Particulars, stating only that "[t]he court *may* direct the filing of a Bill of Particulars." Fed.R.Crim.P. 7(f). (emphasis added.)

United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981) *United States v. Kilrain,* 566 F.2d 979, 985 (5th Cir.) *cert. denied* 439 U.S. 819 (1978).

"Nor is the defendant entitled to a Bill of Particulars with respect to information which is already available through other sources such as . . . discovery and inspection." *United States v. Rosenthal* 793 F.2d at 1227. Pursuant to the Standing Discovery Order previously issued in this case, the Government provided approximately 1,500 pages of materials to the defendant that included documentation of payments, loan consulting agreements, cashiers checks, travel records, documentation of project grants and information concerning corporate entities utilized to funnel bribery monies.

For the foregoing reasons the Court concludes that defendant Briscoe is in possession of sufficiently detailed information to prepare for trial and to plead double jeopardy in the event of a later prosecution for the same offense. Accordingly the Motion for Bill of Particulars is hereby DENIED as to each and every request.

DONE AND ORDERED at West Palm Beach, Florida this 11th day of September, 1991.

/s/ Barry S. Seltzer
BARRY S. SELTZER
United States Magistrate

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 16, 1990]

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89-5

Order Expanding
Jurisdiction

Before: MacKinnon, *Presiding,* Butzner and Pell,
Senior Circuit Judges

Upon consideration of: (1) the Order of the Court of March 1, 1990 appointing the Honorable Arlin M. Adams as Independent Counsel in the above entitled cause to investigate the subject matters designated therein; (2) the Order of March 8, 1990 amending the Order of March 1, 1990 (the "Orders"); (3) the Attorney General's referral to Independent Counsel Adams of other matters related to the subject matter of the investigation authorized by the March 1, 1990 Order (the "referral"), and (4) Independent Counsel Adams' Notice of Acceptance of Referral of Related Matters and Application for Order of Referral of said related matters; the Orders above referred to are further amended to read as follows:

Jurisdictional Order

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c) for the appointment of an independent counsel, (a) with limited jurisdiction to investigate whether Samuel R. Pierce, Jr., former Secretary of the Department of Housing and Urban Development (the "Depart-

ment"), a position listed in section 5312 of title 5, United States Code, and other officials of the Department, and other individuals and entities, may have committed, from 1984 through 1988 inclusive, the crime of conspiracy to defraud the United States or any other federal crimes relating to: (1) the administration of the selection process of the Department's Moderate Rehabilitation Program; and upon consideration of the Attorney General's referral to Independent Counsel, as authorized by 28 U.S.C. § 594(e), of the following additional subject matters related to the Independent Counsel's prosecutorial jurisdiction, to wit: (2) the administration of the Department's Urban Development Action Grant Program and the programs within the Secretary's Discretionary Fund (Technical Assistance and Special Projects) (the "Programs"), (3) the additional matters related to the Independent Counsel's prosecutorial jurisdiction referred to Independent Counsel by the Attorney General, and (4) Independent Counsel Adams' Notice of Acceptance of Related Matters and Application for Order of Referral of said related matters; and (b) with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594; it is

ORDERED, by the Court, in accordance with the authority vested in it by 28 U.S.C. §§ 593(b) and 594, that Arlin M. Adams, Esquire, of the Pennsylvania Bar, with offices at Suite 3600, 1600 Market Street, Philadelphia, Pennsylvania 19103, be and he is hereby appointed Independent Counsel with amended jurisdiction to investigate the following subject matters: the administration of: (1) the Department's Moderate Rehabilitation Program, (2) the Department's Urban Development Action Grant Program, and (3) the programs within the Secretary's Discretionary Fund (Technical Assistance and Special projects) (herein, "the programs"), and whether Samuel R. Pierce, Jr., and other officials of the Department and other persons or entities, from 1984 through 1988 inclusive, may have committed the crime of conspiracy to defraud the United States, or any other federal crimes, including aiding and

abetting, (other than those classified as Class B or C misdemeanors or infractions) relating to the above subject matters; and in the event Independent Counsel determines that any Federal crimes have been committed within the investigative and prosecutorial jurisdiction defined by this Order, to prosecute all offenders for said crimes; and it is

ORDERED, that Independent Counsel Adams shall have prosecutorial jurisdiction with full power and independent authority, as authorized by 28 U.S.C. §§593(b)(3) and 594 (copy attached) to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice (except the Attorney General's authority under 18 U.S.C. § 2516) and to fully investigate and prosecute all government officials, and other persons and entities for any federal crimes, including conspiracy and aiding and abetting (other than those classified as Class B or C misdemeanors or infractions), that investigation determines are related to or arise out of the programs or subject matters described above; and it is

ORDERED, that Independent Counsel Adams shall have prosecutorial jurisdiction to investigate and prosecute Federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may be related to or arise out of the investigation or prosecution of the above described matters, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

Per Curiam
For the Court:

/s/ Constance L. Dupré
Constance L. Dupré
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1994

No. 93-3054
USDC CR 92-0086-01

[Filed October 19, 1994]

United States of America,

Appellee,

v.

Leonard E. Briscoe, Sr.,

Appellant.

BEFORE: Edwards, Chief Judge;
Wald and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed August 1, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

No. 93-3053
DC CR 91-0399-02
92-0086-01
92-0086-02

United States of America,

Appellee,

v.

Lance Henry Wilson,

Appellant.

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and Consolidated Cases No. 93-3054 and 93-3055

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: Wald, Edwards and Randolph, Circuit Judges

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in No. 93-3053 is hereby reversed and the judgments in the remaining cases are affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Date: June 17, 1994

Opinion for the Court filed by Circuit Judge Wald.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No: 92-86

[Filed May 4, 1993]

UNITED STATES OF AMERICA

vs.

LEONARD E. BRISCOE, SR.,
(Name of Defendant)

Barry Levine and Elaine Metlin, Esq.,
Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s) _____ .

☒ was found guilty on count(s) 3 and 5 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 201(c)(1)(A)	Illegal Gratuity	11/85 through late 1987	3
18 USC 201(c)(1)(A)	Illegal Gratuity	5/86 to in or about 3/89	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 1, 2, 4, 6, 7, 8, through 27, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) 3 and 5 (TOTAL $100.00 , which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc.Sec.No.: 465-58-3311

Defendant's Date of Birth: 5/22/40

Defendant's Mailing Address:

4774 Overton Wood Drive
Fort Worth, Texas 76109

Defendant's Residence Address:

Same as above

April 29, 1993
Date of Imposition of Sentence

/s/ Stanley S. Harris
Signature of Judicial Officer

Stanley S. Harris (USDJ)
Name & Title of Judicial Officer

May 3, 1993
Date

Defendant: Leonard E. Briscoe Judgment-Page 2 of 5
Case Number: 92-86

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY-FOUR (24) MONTHS on each of counts 3 and 5 ; Said terms of imprisonment are to run concurrently by the counts.

(Count 3 is prior to the sentencing guidelines.)

(Count 5 is pursuant to the new sentencing guidelines.)

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district,

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States marshall.

☒ The defendant shall surrender for service of sentence at the institution as designated by the Bureau of Prisons.

☐ before 2 p.m. on _____ .

☐ as notified by the United States marshall.

☒ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____,
with a certified copy of this judgment.

_____
United States Marshall

By:_____
Deputy Marshall

Defendant: Leonard E. Briscoe Judgment-Page 3 of 5
Case Number: 92-86

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of One (1) Year on count 5 .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

(1) That the defendant shall provide the probation office access to any requested financial information.

The Court finds that the defendant, who has failed to disclose, in its entirety his true financial situation, has the ability to pay a fine of $50,000.00 ($25,000.00 on each of counts 3 and 5), due within 30 days of sentencing.

If the defendant is unable to pay the fine, he must submit a detailed financial affidavit to the Court within 30 days for further consideration on the fine imposed.

It is Ordered that the defendant pay a special assessment of $50.00 on each of 3 and 5, for a total of $100.00, which should be due immediately.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within ~~the first five days of each month~~.

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person

convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: Leonard E. Briscoe, Sr., Judgment-Page 4 of 5
Case Number: 92-86

FINE

The defendant shall pay a fine of $50,000.00. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

$25,000.00 on count 3.

$25,000.00 on count 5.

To be paid within 30 days of sentencing.

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

☐ in full immediately.

☐ in full not later than _____.

☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: Leonard E. Briscoe, Sr., Judgment-Page 5 of 5
Case Number: 92-86

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 17

Criminal History Category: I

Imprisonment Range: 24 to 30 months

Supervised Release Range: ____ to 1 years

Fine Range: $5,000 to $50,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ n/a

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES

18 U.S.C. § 201. Bribery of public officials and witnesses

* * *

(c) Whoever —

(1) otherwise than as provided by law for the proper discharge of official duty —

(A) directly or indirectly gives, offers, or promises anything of value to any public official,

former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; * * *

shall be fined under this title or imprisoned for not more than two years, or both.

28 U.S.C. § 594. Authority and duties of an independent counsel

(a) Authorities. — Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include —

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and

(10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

* * *

(d) Assistance of Department of Justice. —

(1) In carrying out functions. — An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.*

(2) Payment of and reports on expenditures of independent counsel. — The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593 (b) (4).

(e) Referral of other matters to an independent counsel. — An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial juris-

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* On June 30, 1994, the following sentence was added at the end of 28 U.S.C. § 594(d)(1): "At the request of an independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel." P.L. 103-270, § 3(d)(1), 108 Stat. 732, 736.

diction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

28 U.S.C. § 597. Relationship with Department of Justice

(a) Suspension of other investigations and proceedings. — Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594 (e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

Federal Rule of Criminal Procedure 7(c)(1):

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule,

regulation or other provision of law which the defendant is alleged therein to have violated.

Federal Rule of Criminal Procedure 7(f):

The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

OFFICE OF INDEPENDENT COUNSEL

444 North Capitol Street Suite 718
Washington, D.C. 20001

June 12, 1991

Dexter W. Lehtinen
Office of the United States Attorney
for the Southern District of Florida
155 South Miami Avenue
Miami, Florida 33130

Dear Mr. Lehtinen:

Pursuant to 28 U.S.C. § 597(a) and the Order appointing me Independent Counsel, I hereby authorize your Office's investigation and, if appropriate, prosecution of two matters:

1) a possible conspiracy among Leonard Briscoe, David Steier, and others to bribe a government official, Dubois Gilliam, and

2) a possible conspiracy among Leonard Briscoe, Loy Gunter, and others to make false statements in connection with the draws for Urban Development Action Grant and Community Development Block Grant funds during the construction of the Wedgewood Apartments project.

Thank you for your cooperation in this matter.

Sincerely,

Arlin M. Adams
Independent Counsel

/s/ George Ellard
By: George Ellard
Associate Independent Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed June 12, 1991]

UNITED STATES OF AMERICA

v.

LEONARD BRISCOE
and
MAURICE DAVID STEIER

CASE NO. 91-8066-CR-PAINE
18 USC 201(b)(1)
18 USC 201(c)(1)
18 USC 371

INDICTMENT

The Grand Jury charges that:

INTRODUCTION TO ALL COUNTS

1. At all time material to this Indictment, the United States Department of Housing and Urban Development (HUD) was a department and agency of the United States, the official function of which included the administration of the Urban Development Action Grant (UDAG) program.

2. At all times material to this Indictment, the purpose of the UDAG program was to provide federal financial assistance for the development of real estate projects to cities and urban counties experiencing severe economic distress, and thereby to help stimulate economic development activity needed to aid in economic recovery.

3. At all times material to this Indictment, defendant LEONARD BRISCOE was a real estate developer doing busi-

ness in the Southern District of Florida, and elsewhere, in his own name and in the names of various business entities including, but not limited to, The Briscoe Company, Briscoe Enterprises, Wedgewood Plaza Ltd., and Wedgewood Plaza Associates Ltd.

4. At all times material to this Indictment, defendant MAURICE DAVID STEIER was an attorney licensed to practice law in the State of Nebraska.

5. Northwest Investment Company was a corporation controlled by MAURICE DAVID STEIER and incorporated by him under the laws of the State of Nebraska on January 22, 1986.

6. Mae, Rose & Company was a corporation controlled by MAURICE DAVID STEIER and incorporated by him under the laws of the State of Nebraska on May 21, 1986.

7. From in or about July, 1985, to in or about September, 1987, DuBois Gilliam was Deputy Assistant Secretary for Program Policy Development and Evaluation at HUD and was responsible for the administration of the UDAG program.

8. At all times material to this Indictment, defendant LEONARD BRISCOE was the developer associated with the following real estate projects in Palm Beach County, in the Southern District of Florida, which had been approved by HUD for funding under the UDAG program: the Wedgewood Plaza Apartments, in Riviera Beach; the Wedgewood Plaza Mall, in Riviera Beach; and the Palm Glade Apartments, in Belle Glade.

COUNT I
The Conspiracy

From in or about mid-1985, to in or about March, 1990, the exact dates being unknown to the Grand Jury, at West Palm Beach, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

LEONARD BRISCOE
and MAURICE DAVID STEIER,

themselves and through various business entities over which they exercised management and control, did knowingly and willfully combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury to commit offenses against the United States, that is:

1. knowingly, willfully and corruptly, directly and indirectly, to give, offer and promise money and other things of value to a public official, that is, DuBois Gilliam, with intent to influence an official act, and to influence said public official to commit, aid in committing, collude in, allow, and make opportunity for the commission of, a fraud on the United States, in violation of Title 18, United States Code, Section 201(b)(1)(A) and (B).

2. directly and indirectly, knowingly to give, offer, and promise money and other things of value to a public official, that is, DuBois Gilliam, for and because of official acts performed and to be performed by said public official, in violation of Title 18, United States Code, Section 201(c)(1)(A).

Purpose and Object

It was the purpose and object of this conspiracy, in connection with projects developed by defendant LEONARD BRISCOE and various business entities over which he exercised management and control, to obtain HUD approval of projects under the UDAG program and favorable terms and conditions in the UDAG Grant Agreements relating to such projects, and thereby to obtain unjust and illegal enrichment.

Manner and Means By Which The Conspiracy Was Carried Out

The manner and means by which the conspiracy was sought to be accomplished included the following:

1. It was part of the conspiracy that defendant LEONARD BRISCOE would unlawfully provide money and other things of value to DuBois Gilliam ("bribery money") in order to influence Gilliam's official acts in connection with projects developed by defendant LEONARD BRISCOE and various business entities over which he exercised management and control.

2. It was part of the conspiracy that defendant MAURICE DAVID STEIER would establish corporations that would be used to conceal the payment, receipt, and expenditure of bribery money.

3. It was part of the conspiracy to utilize cash and cashier's checks, thereby making it difficult to trace the source and use of bribery money.

4. It was part of the conspiracy to prepare false and misleading loan documentation as a pretense for the payment of bribery money.

5. It was part of the conspiracy, during DuBois Gilliam's employment with HUD, to conceal the payment of bribery money as legal and consulting fees and to prepare false and misleading documentation regarding such purported services.

6. It was part of the conspiracy, following the termination of DuBois Gilliam's employment with HUD, that defendant LEONARD BRISCOE would pay bribery money to Gilliam disguised as consulting fees.

7. It was part of the conspiracy that defendant LEONARD BRISCOE would make payments to DuBois Gilliam's family while Gilliam was in prison in order to discourage communication and cooperation with law enforcement officers.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, there were committed, by at least one of the co-conspira-

tors herein, in the Southern District of Florida, and elsewhere, at least one of the following overt acts, among others:

1. On or before January 2, 1986, DuBois Gilliam traveled from Miami, Dade County, in the Southern District of Florida, to Orlando, Florida, where he met with defendant LEONARD BRISCOE to receive a payment of bribery money.

2. On or about April 23, 1986, in West Palm Beach, Palm Beach County, in the Southern District of Florida, defendants LEONARD BRISCOE and MAURICE DAVID STEIER caused a letter to be sent by telefax to DuBois Gilliam which requested an amendment of the Grant Agreement for the Wedgewood Plaza Apartments project in Riviera Beach, Florida.

3. On or about April 24, 1986, DuBois Gilliam caused the first amendment of the Grant Agreement for the Wedgewood Plaza Apartments project to be sent by telefax to West Palm Beach, Palm Beach County, in the Southern District of Florida.

4. On or about May 2, 1986, in West Palm Beach, Palm Beach County, in the Southern District of Florida, defendant LEONARD BRISCOE caused a check in the amount of $100,000 and payable to the order of Northwest Investment Company to be sent to defendant MAURICE DAVID STEIER.

5. On or about May 30, 1986, defendant LEONARD BRISCOE caused an application for a UDAG in connection with the Wedgewood Plaza Mall project in Riviera Beach, Florida to be submitted to HUD and therefore to be sent from Palm Beach County, in the Southern District of Florida.

6. On or before May 12, 1987, DuBois Gilliam traveled to Belle Glade, Palm Beach County, in the Southern District of Florida.

7. On or about November 24, 1987, defendant LEONARD BRISCOE caused a cashier's check in the amount of $2,000 and payable to the order of DuBois Gilliam to be

drawn on Flagler National Bank in West Palm Beach, Palm Beach County, in the Southern District of Florida.

8. On or about December 15, 1989, defendant LEONARD BRISCOE caused a letter to be sent to DuBois Gilliam's father setting forth the terms of a purported loan and transmitting therewith a check in the amount of $2,000.00

In violation of Title 18, United States Code, Section 371.

COUNT II

From in or about November, 1985, to in or about late 1987, the exact dates being unknown to the Grand Jury, at West Palm Beach, and Riviera Beach, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

LEONARD BRISCOE

and

MAURICE DAVID STEIER,

knowingly, willfully and corruptly, directly and indirectly, did give, offer and promise money and other things of value to a public official, that is, DuBois Gilliam, a Deputy Assistant Secretary of HUD, with the intent to influence an official act by said public official, that is, DuBois Gilliam's official acts in connection with the approval of the UDAG for the Wedgewood Plaza Apartments project in Riviera Beach, Florida, and the terms and conditions of the UDAG Grant Agreement relating to such project, and to influence said public official to commit, aid in committing, collude in, allow, and make opportunity for the commission of, a fraud on the United States, that is, the interference with and obstruction of the lawful government functions of HUD by deceit, craft, dishonesty, misrepresentation, and overreaching.

In violation of Title 18, United States Code, Sections 201(b)(1)(A), (B), and 2.

COUNT III

From in or about November, 1985, to in or about late 1987, the exact dates being unknown to the Grand Jury, at West Palm Beach, and Riviera Beach, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

LEONARD BRISCOE

and

MAURICE DAVID STEIER,

knowingly did give, offer and promise, directly and indirectly, money and other things of value to a public official, that is, DuBois Gilliam, a Deputy Assistant Secretary of HUD, for and because of official acts performed and to be performed by such public official, that is, DuBois Gilliam's official acts in connection with the approval of the UDAG for the Wedgewood Plaza Apartments project in Riviera Beach, Florida, and the terms and conditions of the UDAG Grant Agreement relating to such project, otherwise than as provided by law for the proper discharge of official duty.

In violation of Title 18, United States Code, Sections 201(c)(1)(A) and 2.

COUNT IV

From in or about May, 1986, to in or about March, 1989, the exact dates being unknown to the Grand Jury, at West Palm Beach, and Riviera Beach, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

LEONARD BRISCOE

and

MAURICE DAVID STEIER,

knowingly, willfully and corruptly, directly and indirectly, did give, offer and promise money and other things of value to a public official, that is, DuBois Gilliam, a Deputy Assistant Secretary of HUD, with the intent to influence an official act by said public official, that is, DuBois Gilliam's official acts in

connection with the approval of the UDAG for the Wedgewood Plaza Mall project in Riviera Beach, Florida, and the terms and conditions of the UDAG Grant Agreement relating to such project, and to influence said public official to commit, aid in committing, collude in, allow, and make opportunity for the commission of, a fraud on the United States, that is, the interference with and obstruction of the lawful government functions of HUD by deceit, craft, dishonesty, misrepresentation, and overreaching.

In violation of Title 18, United States Code, Sections 201(b)(1)(A), (B), and 2.

COUNT V

From in or about May, 1986, to in or about March, 1989, the exact dates being unknown to the Grand Jury, at West Palm Beach, and Riviera Beach, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

LEONARD BRISCOE

and

MAURICE DAVID STEIER,

knowingly did give, offer and promise, directly and indirectly, money and other things of value to a public official, that is, DuBois Gilliam, a Deputy Assistant Secretary of HUD, for and because of official acts performed and to be performed by such public official, that is, DuBois Gilliam's official acts in connection with the approval of the UDAG for the Wedgewood Plaza Mall project in Riviera Beach, Florida, and the terms and conditions of the UDAG Grant Agreement relating to such project, otherwise than as provided by law for the proper discharge of official duty.

In violation of Title 18, United States Code, Sections 201(c)(1)(A) and 2.

COUNT VI

From in or about May, 1986, to in or about March, 1990, the exact dates being unknown to the Grand Jury, at West Palm Beach, and Belle Glade, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

LEONARD BRISCOE,

knowingly, willfully and corruptly, directly and indirectly, did give, offer and promise money and other things of value to a public official, that is, DuBois Gilliam, a Deputy Assistant Secretary of HUD, with the intent to influence an official act by said public official, that is, DuBois Gilliam's official acts in connection with the approval of the UDAG for the Palm Glade Apartments project in Belle Glade, Florida, and the terms and conditions of the UDAG Grant Agreement relating to such project, and to influence said public official to commit, aid in committing, collude in, allow, and make opportunity for the commission of, a fraud on the United States, that is, the interference with and obstruction of the lawful government functions of HUD by deceit, craft, dishonesty, misrepresentation, and overreaching.

In violation of Title 18, United States Code, Sections 201(b)(1)(A), (B), and 2.

COUNT VII

From in or about May, 1986, to in or about March, 1990, the exact dates being unknown to the Grand Jury, at West Palm Beach, and Belle Glade, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

LEONARD BRISCOE,

knowingly did give, offer and promise, directly and indirectly, money and other things of value to a public official, that is, DuBois Gilliam, a Deputy Assistant Secretary of HUD, for and because of official acts performed and to be performed by such

public official, that is, DuBois Gilliam's official acts in connection with the approval of the UDAG for the Palm Glade Apartments project in Belle Glade, Florida, and the terms and conditions of the UDAG Grant Agreement relating to such project, otherwise than as provided by law for the proper discharge of official duty.

In violation of Title 18, United States Code, Sections 201(c)(1)(A) and 2.

A TRUE BILL

/s/
FOREPERSON

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE

Docket No. CR 91-0399

Washington, D.C.,
December 2, 1991
3:10 p.m.

TRANSCRIPT OF ARRAIGNMENT HEARING
ON SUPERSEDING INDICTMENT
BEFORE THE HONORABLE STANLEY S. HARRIS,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR THE GOVERNMENT: ROSCOE HOWARD, ESQ.
DIANNE JEAN SMITH, ESQ.
GEORGE ELLARD, ESQ.
Office of Independent Counsel
444 North Capitol Street, N.W.
Washington, D.C. 20001

FOR THE DEFENDANT: BARRY W. LEVINE, ESQ.
ELAINE METLIN, ESQ.
CHARLES CLARK, ESQ.
Dickstein, Shapiro & Morin
2101 "L"Street, N.W.
Washington, D.C. 20037

COURT REPORTER: Robert M. Weber
Room 6818 U.S. District Courthouse
Washington, D.C. 20001

Proceedings recorded by mechanical stenography; transcript produced by notereading.

[15]

along. And we think that—we think that if we refile the motion to reconsider with Judge Robinson, that eventually we will prevail.

We think the Grand Jury subpoenas are appropriate, that the documents that are within his possession are rightfully sought and properly put before the Grand Jury, and Mr. Levine is just considering to do that.

Other than that, your Honor, as to the specific obligations, I'd just point out that they are simply wrong. Mr. Levine has highlighted certain facts without bringing everything before the Court.

Instead of me answering every one of the charges, I would suggest to the Court that Mr. Levine be directed to file a motion; and we'd also invite him to have the Court—not saying how the Government would rule—but we'd point out that what he's doing simply smacks of forum shopping.

I think that when he indicates that the cases belong up here, in fact, the District of Columbia has no venue over the cases in the Southern District of Florida, and that's why they were brought down there—as the Southern District of Florida has no venue over the charges that are before this Court today; they are properly brought in the District of Columbia.

He can file a motion to transfer these cases now

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE

Docket No. CR 91-0399
Washington, D.C.
January 6, 1992
1:35 p.m.

TRANSCRIPT OF STATUS CALL
BEFORE THE HONORABLE STANLEY S. HARRIS,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: ROSCOE C. HOWARD, JR., ESQ.
GEORGE ELLARD, ESQ.
DIANE SMITH, ESQ.
ARLIN M. ADAMS, Esq.
Office of Independent Counsel
444 North Capitol Street, N.W.
Suite 718
Washington, D.C. 20001

FOR THE DEFENDANT: BARRY W. LEVINE, ESQ.
ELAINE METLIN, ESQ.
Dickstein, Shapiro & Morin
2101 "L" Street, N.W.
Washington, D.C. 20037

COURT REPORTER: Robert M. Weber
Room 6818 U.S. District Courthouse
Washington, D.C. 20001

Proceedings recorded by mechanical stenography; transcript produced by notereading.

[31]

tell it to them; we tell it to the world; and we feel comfortable telling it to the Court, your Honor.

I hope before I sit down your Honor will be kind enough to set a trial date.

THE COURT: Okay. Thank you.

THE COURT: Mr. Howard?

MR. HOWARD: Your Honor, I understand your impatience. I will not try it in terms of irrelevant matters.

What we would point out is that the Florida matters certainly started before this matter did. They've been at the investigation a longer time.

It's certainly no surprise that they would have been ready for trial before we were.

In terms of —

THE COURT: Nothing has been set, though?

MR. HOWARD: I believe there is a status hearing set for January 21st. My understanding is, assuming—you can ask Mr. Levine—I don't know—I assume they are going to go to trial in January.

But certainly by the time this office was even started, the Southern District of Florida was well into their investigation.

It certainly dovetailed with ours, and we have discussed it with them.

But that is their case down there. We have no

[32]

venue here.

And even if this office decided to hold those cases, they would have had to have been brought in Florida one way or the other. And that's where they are. They're properly there.

Mr. Levine, you know, understanding his or attempting to understand his frustration and attempting to speak to the world, as he put it, in terms of what was going on, simply overlooked the fact that if those cases were brought here, I am sure the first thing the Government would see would be a motion to transfer those cases back to Florida where they belong.

In terms of discovery, your Honor, you know, I mean maybe one of the problems that Mr. Levine is having with determining exactly what is going on with our investigation is the fact that it was only last week that they started into discovery.

It's been available since the end of the summer. Certainly they've had a lot of opportunity; but I think that Ms. Metlin came over either Thursday or Friday of last week to start discovery. We'd be glad to give them whatever they want.

Brady—I don't remember specific Brady requests. There may have been—I'll have to check my files.

But certainly we understand what our Brady obligations

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LANCE HENRY WILSON
LEONARD E. BRISCOE

CRIMINAL NO. 91-0399

UNITED STATES OF AMERICA

v.

MAURICE STEIER
LEONARD E. BRISCOE

CRIMINAL NO. 92-0085

TRANSCRIPT OF PROCEEDINGS

PREPARED FOR: Counsel for Defendant Briscoe

DATE: Monday, April 6, 1992
PAGES: 1 - 33
INDEX:

Robert M. Weber
Official Reporter

[5]
joining our Briscoe-Wilson case, the one that's called - 399, with the Briscoe-Steier case—and do that as a joint trial.

Our evidence overlaps; our witnesses overlap; and as we've represented before in the Courtroom, the cases are essentially one and the same.

What we were hoping to do today was—

THE COURT: Mr. Levine is reasonably young still but apparently his hearing is causing him some difficulty.

MR. HOWARD: I'm Sorry. I'll see if I can't—

THE COURT: If you would, speak in the microphone.

MR. LEVINE: It's more in disbelief of what I hear, your Honor.

THE COURT: Either it is — you might move the microphone down just a little bit, Mr. Howard.

MR. HOWARD: (Complying) Okay. Usually people tell me I'm too loud.

I made that representation, and I just wanted to repeat that we hope to—I'll file a motion in the next few days just to get the cases on the same track.

It would be our desire to try those two cases together now that they are here.

THE COURT: For the record, am I correct in believing that never before have cases that have been indicted by the U.S. Attorney's Office in another district and then transferred up and then in theory hooked up to an independent counsel case?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

LEONARD E. BRISCOE, SR.
LANCE W. WILSON

Crim. No. 91-0399 (SSH)

UNITED STATES

v.

LEONARD E. BRISCOE, SR.
MAURICE DAVID STEIER

Crim. No. 91-8066
(Transferred from The Southern District of Florida)

GOVERNMENT'S MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE INDICTMENTS AND TRIALS

The United States, by and through the Office of Independent Counsel and the Department of Justice, hereby files this memorandum in support of its motion pursuant to Rule 13 of the Federal Rules of Criminal Procedure to consolidate the indictments in *United States* v. *Briscoe and Wilson,* Criminal No. 91-0399, indicted in the District of Columbia, and *United States* v. *Briscoe and Steier,* Criminal No. 91-8066, indicted in the Southern District of Florida and transferred to the District of Columbia from the Southern District of Florida pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure.

The *Briscoe/Wilson* indictment and the *Briscoe/Steier*

* * *

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B. *Consolidation Is Proper Under The Rules And Case Law*

1. ***The Two Indictments Charge Offenses Based on the Same Acts and Transactions and on a Common Scheme and Plan***

The two indictments at issue here charge offenses based on the same acts and transactions and arising from a common scheme and plan. The three defendants who would be consolidated in one trial (Briscoe, Wilson, and Steier) acted together in a classic conspiracy, with unindicted co-conspirator DuBois Gilliam.

In the *Briscoe/Wilson* indictment, the Grand Jury has charged that defendant Briscoe, through an applicant city, applied to the Department of Housing and Urban Development (HUD) for Urban Development Action Grants (UDAGs) on three separate occasions. Defendant Wilson then supplied firm financial commitment letters (as required by HUD) for each of the three projects, purportedly on behalf of his employer. The Grand Jury has charged that all three of these commitments were false, and that defendant Briscoe, knowing they were false, accepted them so that HUD would award the three UDAG grants to him.

In this scheme, DuBois Gilliam, at the time employed as Deputy Assistant Secretary for Community and Planning Development at HUD, acted for the benefit of defendant Briscoe by ensuring that HUD approved the three UDAG grants, over the objections of HUD personnel. In return for this service, defendant Briscoe provided Gilliam money and other things of value. These payments were disguised as payments to defendant Steier for work Steier allegedly performed on behalf of each of the projects. The money was paid to

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LEONARD BRISCOE, LANCE WILSON,
and MAURICE DAVID STEIER

Crim. No. 91-399 (SSH)
Crim. No. 92-86 (SSH)

GOVERNMENT'S RESPONSE TO
DEFENDANT BRISCOE'S PRE-TRIAL MOTIONS

Briscoe's own strategic choices. Third, in light of the unusual nature and complexity of these proceedings, a reprosecution would not create a precedent that detracted from the administration of the Act or of justice itself.

Briscoe's argument that dismissal here would have to be with prejudice is defective in the first instance because he fails to address these factors. Instead, he asserts that any dismissal should be with prejudice due to the Government's alleged "strategic posturing." That claim is unfounded. It is Briscoe, not the Government, who moved for a transfer, rather than proceeding to trial in Florida and the District of Columbia. The Government may not be punished for Briscoe's strategic decisions.

II. *The Delegation of the Authority to the Department of Justice Was Proper*

Defendant Briscoe argues that the *Steier* indictment must be dismissed with prejudice because the OIC did not delegate in writing the Department of Justice (DOJ) the investigation of

defendants Briscoe and Steier, as required by 28 U.S.C. §597(a). That allegation is false, as is shown by the attached letter to the United States Attorney for the Southern District of Florida. *See* Exhibit C.

Mr. Briscoe also argues that, even if the delegation was formally correct, the OIC is without power to delegate that authority because the Briscoe/Steier investigation in an "important or substantial" part of the OIC's jurisdiction. As is demonstrated below, defendant Briscoe's argument is legally meritless; and the

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE, SR.
LANCE HENRY WILSON
MAURICE DAVID STEIER

Docket Nos.
CR 91-0399
CR 92-0086

Washington, D.C.
October 26, 1992
10:15 a.m.

VOLUME XVII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE STANLEY S. HARRIS,
UNITED STATES DISTRICT JUDGE, AND A JURY.

APPEARANCES:

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BARRY W. LEVINE, ESQ.
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2101 L Street, N.W.
Washington, D.C. 20037

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A. Mr. Briscoe paid for the tickets.

Q. You picked them up at the airport?

A. No, I picked them up at the Four Seasons Hotel.

Q. Do you remember when that was?

A. Not the exact date and time.

Q. Will you tell the members of the jury when you actually went to Texas?

A. In about March of 1987.

Q. What happened when you went to Texas?

A. I went to Texas, the children and I, we stayed at the Worthington Hotel in downtown Fort Worth.

Q. What hotel?

A. Worthington.

Q. W-O-R-T-H-I-N-G-T-O-N?

A. I don't know the correct spelling.

Q. Go ahead.

A. We did some shopping while I was there and purchased some suits and my children did some shopping as far as buying children's clothes.

Q. Do you remember where you purchased your suits?

A. Not the name of the shop, no.

Q. Will you tell the members of the jury

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whether you were alone when you went to purchase the suits?

A. No, I was not.

Q. Who were you with?

A. Leonard Briscoe and I.

Q. Why don't you tell the members of the jury what happened when you went to purchase the suits?

A. I had asked Mr. Briscoe to purchase me those suits and he did. It was about five suits. I bought five suits, five shirts and five ties and also we went to another store and I purchased two pairs of shoes.

Q. Do you know how Mr. Briscoe paid for that merchandise?

A. The merchandise was — had to be — alterations had to be made on the suits and it was handled with American Express cards and which time he was going to come back the following week to pay for the suits.

Q. It was held with whose American Express cards?

A. Mr. Briscoe's.

Q. Do you know how much the suits cost?

A. Not over $2,500.

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Q. You said that some purchases were made for your children; is that right?

A. Yes.

Q. How many of your children were with you?

A. Two.

Q. Which two and what were their ages?

A. At that time it was DuBois Gilliam, Junior, who at that time was about 9, and Nicole was 10.

Q. Do you know what was purchased for them?

A. Purchased children's clothes.

Q. Do you know who paid for those?

A. I received cash from Mr. Briscoe.

Q. How much cash did you receive?

A. At that time I received $2,500 at which time I spent 1,200 on the children.

Q. Did you go with the children when they purchased the clothes?

A. Yes, I did.

Q. How long were you down in Texas?

A. About a day and a half.

Q. Did you ever receive the suits? You said they were altered, correct?

A. The alterations had to be made on the suits.

* * *

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A. It is the UDAG grant agreement for Belle Glade, Florida.

Q. Who signed the grant agreement?

A. I signed it.

Q. Was there a — was money actually pulled down in this and was there a check presentation?

A. There was a ceremonial check presentation, yes.

Q. What is a ceremonial check presentation?

A. Just a nonnegotiable blown-up check that is presented to the community where the award was made.

Q. When did that occur?

A. There was a ceremonial check presentation in May of 1987.

Q. Is this just a photograph session?

A. Pardon me?

Q. Is this a photograph session?

A. Yes.

Q. Who was there?

A. I was there to make the check presentation along with the area manager from Jacksonville, Florida HUD office.

Q. Who was that?

A. I don't remember his name.

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Q. Go ahead. Anybody else?

A. The mayor of Belle Glade and other city staff people, members from the city council and community organizations, community-based organizations.

Q. What happened while at this check presentation in May of 1987?

A. Just a formal check presentation made to the city of Belle Glade awarding this money for this housing project.

Q. Did you have an opportunity to meet with Mr. Briscoe while — during this presentation?

A. I did.

Q. And this is in Belle Glade, Florida; is this correct?

A. Yes.

Q. Will you tell the members of the jury what happened when you met with Mr. Briscoe?

A. Well, I first met Mr. Briscoe at the ceremony whereby the check presentation was made and once that finished, I met with Mr. Briscoe at the Royce Hotel down in West Palm Beach.

Q. When you met with him, will you tell the members of the jury what happened?

A. I met with Mr. Briscoe at the Royce Hotel

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in West Palm Beach, at which time I received cash of $2,000.

Q. What was the cash for?

A. I had asked for some money.

Q. What did you need money for?

A. I needed to cover some expenses and I asked him for the money.

Q. Did he give it to you?

A. Yes.

Q. Did you and Mr. Briscoe talk?

A. Yes, we did.

Q. Will you tell the members of the jury what you talked about?

A. He told me he really appreciated me coming down and making the check presentation, he needed that kind of boost right now and he told me that Lance worked for a chicken shit organization in Paine Webber.

Q. Did he tell you why Paine Webber was, as you say, a chicken shit organization?

A. He asked Paine Webber to stay and honor the letter commitment, and that is what I was told.

Q. What was Mr. Wilson's reaction to that?

A. I don't know what Mr. Wilson's reaction was to that.

* * *

[3739, Δ p.170]

A. After I left HUD in 1987?

Q. '87, I apologize. Did you get any money from Leonard Briscoe?

A. I got all the money from Leonard Briscoe in 1987. I received a loan from Leonard Briscoe in 1987.

Q. Let me show you what has been marked as Government's Exhibit 103.

MR. LEVINE: Your Honor, I didn't hear the last answer to the last question.

Q. Do you recognize Government's Exhibit 103?

A. Yes.

Q. Will you tell the members of the jury what it is?

A. It is a promissory note.

Q. What is it for?

A. $2,000.

Q. Who signed the promissory note?

A. I do.

Q. Anybody else?

A. No.

Q. Do you recognize that as a loan document that you have received?

A. Yes.

[3740, Δ p.171]

MR. HOWARD: Your Honor, the government would move Government's Exhibit 103 into evidence.

MR. DAVIS: I have no objection.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection.

THE COURT: Government's Exhibit 103 is received into evidence.

(Government's Exhibit Number 103 was received in evidence.)

Q. What is Government's Exhibit — well, let me ask you: Attached to Government's Exhibit 103 is there a check?

A. Yes.

Q. Who is the check made out to?

A. The check is made out to DuBois Gilliam from Flagler National Bank.

Q. Who is the remitter?

A. Ms. Johnson.

Q. Look at the top. It says remitter.

A. Okay, Briscoe Enterprises.

Q. The date on the check?

A. Dated November 24, 1987.

Q. What is this money for?

A. I had asked for some money from Mr. Briscoe and he made arrangements for me to

[3741, Δ p.172]

receive a loan from him.

Q. Was this a loan?

A. This was a loan on paper, yes.

Q. You say a loan on paper, what do you mean?

A. It was a loan I received on paper, but I would not be required to pay it back.

Q. Was it a loan?

A. No.

Q. What was it?

A. I had asked Mr. Briscoe for some money and he gave it to me.

Q. Why did you want the loan on paper?

A. Because I wanted to create a paper trail for the activities we had going on at that time.

Q. Why did you want a paper trail for the activities you had ongoing at the time?

A. Because I was under investigation.

Q. By whom?

A. By the Justice Department.

Q. Did you and Mr. Briscoe discuss making a paper trail?

A. We discussed the fact that we needed to get a loan document prepared.

Q. Sir, you said you weren't required to pay

[3742, Δ p.173]

this back. Who did you learn that from?

A. Mr. Briscoe.

Q. Did you ever pay any of this back?

A. No.

Q. Were you ever asked to pay it back?

A. No.

Q. Did you ever intend to pay it back?

A. No.

Q. You said this was pocket money? Was it payment for anything you had done for him in the past or was it just pocket money?

MR. LEVINE: Objection, money, leading.

A. Pocket money. I asked for the money for the holidays.

MR. LEVINE: Your Honor, there is a correct way to ask the question.

THE COURT: Could you reask the question?

MR. HOWARD: I asked him if it was pocket money.

THE COURT: The objection is overruled.

A. I asked Mr. Briscoe for money to have for over the holidays and he made it available to me.

Q. Did you get any more money from Mr. Briscoe?

A. Yes, I did.

[3743, Δ p.174]

Q. Would you tell the members of the jury when you got that?

A. I made arrangements to get cash payments from Mr. Briscoe between the range of 2,400 and $4,000 starting in January of 1988 up until November of 1988.

Q. What was this money for?

A. These monies were coming out of the projects I had worked for him on as far as Wedgewood — not Wedgewood, but as far as Belle Glade and the Wedgewood Mall.

Q. How much monies did you think you were entitled to at this point?

A. Right around 168,000.

Q. How did you come to that conclusion?

A. By taking two percent times the UDAG amounts.

Q. Is this money that you reported in Government's Exhibit 60, the ledger?

A. I did not.

Q. Why?

A. I had received so much money from HUD or from the HUD contractors and developers that it was just one of those that I did not list.

Q. How did you receive this money?

[3744, Δ p.175]

A. I received it in cash payments.

Q. How did — where were you when you received the cash payments?

A. I would make a trip once a month to Florida.

Q. What would you do when you got to Florida?

A. I would go from the airport to meet with Mr. Briscoe. Pick up my money and I would return back.

Q. Did you — were there any documents created with this?

A. Sometimes I stayed all night and stayed at the Royce Hotel.

Q. Did you and Mr. Briscoe create any documents yourselves?

A. At a later date.

Q. What documents did you create?

A. Mr. Briscoe was concerned about the taxes being paid on the money because he showed the money going to him and, therefore, I told him we would find a project to work on and we found a project in Yonkers, New York.

Q. I would like to show you some exhibits, if I could.

[3745, Δ p.176]

Before we get to the Yonkers project, sir, I would like to show you first what has been marked as Government's Exhibit 101A and ask you if you recognize it?

A. Yes.

Q. Will you tell the members of the jury how you recognize it?

A. Airline ticket I purchased.

Q. How do you know, do you see your signature?

A. Yes.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 101A into evidence.

MR. DAVIS: No objection.

THE COURT: Any objection, Ms. Rogers?

MR. LEVINE: One moment please, your Honor.

THE COURT: I was asking Ms. Rogers first.

MS. ROGERS: One moment.

THE COURT: Okay.

MS. ROGERS: No objection, your Honor.

THE COURT: Thank you.

MR. LEVINE: No objection, your Honor.

THE COURT: Government's Exhibit 101A is

[3746, Δ p.177]

received into evidence.

(Government's Exhibit Number 101A was received in evidence.)

BY MR. HOWARD:

Q. What is Government's Exhibit 101A, Mr. Gilliam?

A. Airline ticket purchased by myself.

Q. Can you tell the members of the jury what day you traveled?

A. June 29th.

Q. If you could pull it out of its sleeve. First of all, on the 29th will you tell the members of the jury where you traveled from and where you traveled to?

MR. DAVIS: Objection, your Honor. Could we have a year?

Q. Do you know the year?

THE COURT: I think that has been developed, but —

A. It is June 29th, 1988.

Q. Will you tell the members of the jury where you traveled from and where you were traveling to?

A. Traveled from Montgomery, Alabama through Atlanta to West Palm Beach, Florida.

[3747, Δ p.178]

Q. What were you doing in West Palm Beach, Florida?

A. I was going to pick up some money from Mr. Briscoe.

Q. Will you look at the last page? When did you leave West Palm Beach?

A. June 30th, 1988.

Q. Traveling from where?

A. West Palm Beach to Raleigh-Durham to Washington National.

Q. I am going to show you what has been marked as Government's Exhibit 101B. Do you recognize that document?

A. This is an airline ticket I purchased.

Q. How do you recognize it?

A. My signature is on it.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 101B into evidence.

MS. ROGERS: No objection, your Honor.

MR. DAVIS: No objection.

MR. LEVINE: No objection, Judge.

THE COURT: Government's Exhibit 101B is received into evidence.

(Government's Exhibit Number 101B was received into evidence.)

[3748, Δ p.179]

BY MR. HOWARD:

Q. Will you tell the members of the jury — first of all, what is the date of your travel for Government's Exhibit 101B?

A. The travel date is July 14th, 1988.

Q. This appears to be a one-way ticket; is that right?

A. It is.

Q. Do you know how you got to West Palm?

A. Yes.

Q. How?

A. I flew to Miami and had somebody drive me to West Palm Beach.

Q. What were you doing in West Palm Beach, sir?

A. Picking up some money.

Q. From?

A. From Mr. Briscoe.

Q. I am going to show you what has been marked as Government's Exhibit 101C. I ask you if you recognize Government's Exhibit 101C?

A. Yes, I do.

Q. How do you recognize it?

A. It is a ticket I purchased.

MR. HOWARD: Your Honor, the government [3749, Δ p.180] would move Government's Exhibit 101C into evidence.

MR. LEVINE: Your Honor, this is a different date. This is 1989, April of '89 and the other one was incomplete, the 101B doesn't have the flight to Miami.

THE COURT: Well, we are talking about 101B is in evidence.

MR. LEVINE: Now we see it is incomplete, your Honor. 101C is 1989.

THE COURT: Where are we?

MR. LEVINE: Your Honor, 101C shows the flight in April of '89 and returned in October of '88. Can't be right.

MR. DAVIS: Put together, something is wrong, your Honor.

THE COURT: Do you need to check?

MR. HOWARD: Your Honor, let me find out.

(Discussion off the record.)

BY MR. HOWARD:

Q. Mr. Gilliam, I am going to show you the first page of the document that I described to you before, Government's Exhibit 101C and it looks like to be one-half of an airline ticket. Would you tell the members of the jury whether you recognize that document?

[3750, Δ p.181]

MR. LEVINE: Which one is this?

MR. HOWARD: The first page of the document I just showed you.

MR. LEVINE: What exhibit number?

MR. HOWARD: 101C.

Q. Do you recognize 101C?

A. Yes.

Q. What is it?

A. It is an airline ticket I purchased in April of 1989.

MR. HOWARD: Your Honor, we would move Government's Exhibit 101C which is the first page of a —

MR. LEVINE: Objection. Not relevant time period.

THE COURT: Could we please talk over here for a minute?

(At the side bar.)

MR. DAVIS: They have two of them. They have one showing he went down in April of '89 and then the return or coming back or something is October of '88.

MR. HOWARD: Your Honor, we split it into two. We will call the second page 101H and these will be tickets that refer to the Yonkers project

[182, π p.3751]

and he was flying down.

THE COURT: Which project?

MR. HOWARD: The next subject matter we are getting into is a project that he worked for with Mr. Briscoe involving the Yonkers project. I am just asking why he was down there and I believe he will testify this was as to the Yonkers project.

MR. DAVIS: In Yonkers, New York?

MR. HOWARD: Yes.

MS. ROGERS: The first page is 101C and the second page becomes 101H.

MS. METLIN: What are you moving in now?

MR. HOWARD: 101C.

MS. METLIN: Even though we are talking about 1988?

MR. HOWARD: The next thing he is going into, your Honor, is the Yonkers project.

MR. LEVINE: Your Honor, this testimony is now becoming incoherent. I had understood this gentleman to testify that there were 10 months in a row where he went down to Florida by flight to get $2,000 a month in cash. That has been his testimony, and these — the 101 series starting with 101A was designed to prove that fact by showing or corroborate that fact by showing airline tickets.

[183, π p.3752]

The first one was 101A, which was a flight from Alabama to Atlanta to West Palm that was dated on June 29, '88 and that was received by your Honor in evidence.

There was a return ticket which is part of that two days later, June 30, 1988 from West Palm through Raleigh

to Washington. That package of two which was denominated 101A has been received. That was June. Then we went to 101B which was to have been July.

THE COURT: Two weeks later.

MR. LEVINE: About two weeks later he goes down on July 14, '88, tickets purchased on the 13th, he flys on the 14th, West Palm to National is what they have shown us and I believe he testified without any tickets that he flew to Miami and was driven north by someone he called somebody from Miami to West Palm, so there is no ticket flying down to Miami that has been provided to us.

Now, that brings us to 101C which is a 1989 ticket purchased on April 13, '89 for a flight on the same date and that is a flight from West Palm to Washington and there is no ticket down, corresponding ticket down because the next one from Washington to West Palm is dated October '88 which,

[184, π p.3753]

of course, could not have been related to the April, '89 ticket if this testimony is to be believed.

THE COURT: He has offered 101C which is the flight down —

MR. LEVINE: Well, the testimony has now become hopelessly confused and incoherent and I think the court should not admit evidence that has become incoherent. It is not competent nor is it relevant to prove the testimony or corroborate the testimony for which it was offered. It was offered to show the airline tickets to go down on a monthly basis to get this cash and it doesn't do that. It ought not to be received. It is not competent to prove that and it is not competent to corroborate that. That is the reason, your Honor. It really hopelessly confuses this record.

THE COURT: Mr. Howard.

MR. HOWARD: Your Honor, I don't think it is hopelessly confused. I think what he will testify to is that the '89 trip was for Yonkers. He did mention that he created a trail later to cover up this and that was the Yonkers project and this is what I believe he is going to testify that the '89 trip is. I believe, quite frankly, that the jury knows what is going on.

[185, π p.3754]

MR. LEVINE: That is quite frank.

MR. HOWARD: We are trying to move through this and I am trying to finish before 5:30. All of these documents relate to his trips to West Palm and getting money from Mr. Briscoe and I think they are all relevant and try to get it in and finish in as quickly as we can.

MR. LEVINE: All I want is to get it in and not be confusing, get it right. I understand he wants to beat the clock, but the primary objective ought to be get it in a coherent and nonconfusing way and the observation by Mr. Howard advanced, quite frankly, I think the phrase he used that the jury understands it is not what we are about. We need to do this in an orderly way.

MR. DAVIS: I am not going to have an objection and obviously there are some confusion. If you could take tonight and put it together and you can finish up in the first 10 or 15 minutes tomorrow, we wouldn't have to be wrestling with the documents and we wouldn't have these side bars.

MR. HOWARD: So far we have had two documents misstapled and I don't consider that a big deal. He can identify both of them and I believe I know what they both are.

[186, π p.3755]

MS. ROGERS: You are putting them in differently?

MR. HOWARD: Yes.

MS. ROGERS: Okay.

MR. HOWARD: I am not trying to fool anybody here. They were misstapled and that happens and I am not going to sit here and say I am perfect. I will make a representation that I believe that is what they are and the next subject we go into is Yonkers, highly relevant and that is what this is. After that I think it is —

THE COURT: It is a matter of argument.

MS. METLIN: Then you are not going to move back from Yonkers to back from 1989 back to 1988 when you get to 101G? My only problem is I don't know why we — he has opened up this area of testimony where he is saying there was something that happened in '88 and it seems to me makes sense to finish '88 and then move to '89, but if we put 101C in now, we are jumping from July of '88 to April of '89 and then we are going to go back to October of '88 and I am confused.

MS. ROGERS: We have no objection.

THE COURT: We will just take them one at a time and straighten them out once they are in.

[187, π p.3756]

(In open court, jury present.)

THE COURT: Those two have been unstapled and Government's Exhibit 101C is received in evidence.

(Government's Exhibit Number 101C was received in evidence.)

BY MR. HOWARD:

Q. What is Government's Exhibit 101C, Mr. Gilliam?

A. Airline ticket.

Q. What is the date on it?

A. April 13, 1989.

Q. Where are you traveling?

A. West Palm Beach, Raleigh-Durham and Washington National.

Q. Now, in 1989 why were you traveling down to West Palm Beach?

A. On this particular date I don't know why I traveled down there.

MR. HOWARD: Your Honor, the government would withdraw Government's Exhibit —

MR. LEVINE: Your Honor, may we go to side bar?

THE COURT: He is withdrawing Government's Exhibit 101C.

[188, π p.3757]

MR. LEVINE: May we still come to side bar?

THE COURT: Surely.

(At the side bar.)

MR. LEVINE: Your Honor, this entire line of questioning with respect to the trips to Florida in 1988, so-called monthly trips, is not pleaded in this indictment. What they have here in the excess of I think 103 overt acts that they say —

THE COURT: Let's stick to what we are dealing with now which is he is withdrawing the 101C as I heard you say?

MS. ROGERS: 101C.

MR. HOWARD: 101C, yes.

MR. LEVINE: I want to object to the inquiry with respect to what happened in 1988 because none of this is pleaded. There is only one event in 1988 that is pleaded in this indictment and it is May 12 Lance Wilson signed a partnership document. None of this he is adducing now pertains to money from Briscoe. We asked for bills of particu-

lar, we asked for this and he opposed it, we never got it and now it is being sprung on us and this purports to be bribe money. That is what he is saying and they can't change their theory in the

[189, π p.3758]

middle of trial and they have to plead it or give us a bill and they didn't do that, and I have been trying to track this indictment and I have tracked this indictment and none of that evidence is here, none of it.

THE COURT: Well, there is a lot more evidence than there is in the indictment.

MR. LEVINE: Well, it has got to prove the allegations in the indictment. That is what it has got to be limited to. Now they are saying — this is not just evidence, this is what they are alleging to be bribes. They are saying in a hotel once a month for the whole year of '88 it was omitted from that document, the ledger that purported to be the roster of these criminal acts and all of the sudden now for the first time at trial we are hearing about this.

THE COURT: Help me for what you are looking for now. There is nothing pending and you are telling me all of this.

MR. LEVINE: I move to strike the testimony with respect to bribes in 1988, 101A, B, I understand C is now withdrawn and I move to strike the oral testimony about those trips and ask that the jury be instructed to disregard that. It is

[190, π p.3759]

just not pleaded here, your Honor. I offer you my copy of this well worn indictment, and I suspect the court has its own, but I give it to you for your review, Judge.

THE COURT: Mr. Howard.

MR. HOWARD: Your Honor, we could have pled one overt act and proved everything we have. He is certainly on notice that they paid him a bribe. We don't have to lay out every bit of evidence in a conspiracy charge. I don't know where that is the law anywhere. We have to prove one act, and we think that we can do that and we only have to plead one act and we think that we can do that.

As to the bill of particulars, the real problem there is that one, I don't think it was called for because I think this is a document that puts you on notice and two, it just came to them too late. That is not our fault. This is highly relevant. He has said he has taken money, talked about how he got it from the mall, other projects and how he is expecting it from Mr. Briscoe and this is how he is getting paid off. It is about as relevant as anything you will ever get.

MR. LEVINE: Your Honor, this is not pleaded in the Grand Jury. There is no mention of

[191, π p.3760]

this in the Grand Jury transcript which we read carefully. Maybe we would be assisted if Mr. Howard could tell the court when he learned of this. Is it so recent? We need to know when the government learned of this.

MR. HOWARD: Your Honor, it is irrelevant.

THE COURT: I have trouble with that, too.

MR. LEVINE: Because if this is a recent fabrication after he has gone through two years of investigation and living with this witness, we are entitled to know if this witness has just recently so-called recalled this and the other problem is the notice problem. Because it is not in the indictment, because these dates are dates that we are hearing now for the first time, how do we prepare for this how do we know if there is an alibi that Mr. Briscoe wasn't there?

It goes right to the heart of notice. It goes right to the heart of why you have a bill of particulars.

What is the official act, what is the bribe? We asked that and they refused to give it to us. And how do we deal with that?

MR. HOWARD: Your Honor, if I could, one,

[192, π p.3761]

we are looking at the wrong document, but these documents themselves were given to Mr. Levine in Florida-over a year and a half ago. He has had them that long.

MR. LEVINE: It is not pleaded.

MR. HOWARD: Your Honor, it doesn't have to be pleaded. The fact of the matter is that we have to make available to them any document that we plan to use in discovery. They have had this for over 18 months. It is pretty obvious that it was never asked what we were using them for, but they certainly know the evidence existed. I don't think we have to plead it. As I said, we could have pled one overt act and I think that would have satisfied the —

MR. LEVINE: You have to give notice of the overt act. Sure they can do it with one overt act, but they have to give notice and tell us what it is. This is just an invention of today. We have never seen this before and they give us boxes, over a hundred boxes of documents.

MS. SMITH: No.

MR. LEVINE: Some of it is not relevant to this case. Some of it was relevant to cases that your Honor retransferred. The fact that it is there

[193, π p.3762]

unless it is part of the notice called an indictment. This is what this document, the indictment is, notice of that which we have to defends against. This is what it is, and so we read the dates, to the extent we are entitled to more information,

we file a motion for a bill of particulars and we did that. They opposed it and your Honor denied our motion.

THE COURT: You are asking me — there is no question pending and there is no exhibit offered and you are asking me in effect to sit here and analyze all of this discovery matter, indictment on some oral basis here as we sit around 25 until 6:00 and I am not going to do it.

MR. LEVINE: Your Honor, I am not asking you to analyze any discovery. I merely want to bring to the court's attention the very obvious, and that is that this indictment does not plead those events in 1988 about which this witness is now being called upon to testify and that is not a difficult task.

One can just look at the overt acts and for the most part it pleaded in order, there is one exception to that, but they are mostly dates—

THE COURT: Let's let the jury go. We are

[194, π p.3763]

just going on around in circles here.

MR. HOWARD: I think I can take 10 minutes in the morning and finish up.

MR. GELBER: I am unaware of any requirement under the law about—

THE COURT: I am not either.

MR. GELBER: As far as the discovery—

THE COURT: If you have got anything to tell me.

MR. LEVINE: I made my argument. That is all I can do, Judge. That is all I can do.

MR. GELBER: For the record, there is no requirement I am aware of in any circuit that the government has to plead every matter of its proof in an overt act in a 371 or any other type of conspiracy. Certainly one

overt act is necessary and maybe more is put in and the bill of particulars is denied.

MR. LEVINE: This is exactly the extent to elucidate that GAF deals with this issue. Davidoff from the Second Circuit deals with this issue and there are cases that deal with this issue and tell us what the right way to do this is and the government is prohibited from changing or developing its theory in the midst of trial. That is the

[195, π p.3764]

purpose for the bill of particulars, and they didn't give it to us.

THE COURT: I think at this point, though—do you have a problem with recessing?

MR. HOWARD: No, your Honor.

MR. SMITH: Not at all.

(In open court, jury present.)

THE COURT: Thanks for bearing with us, folks. As we have chatted, we have agreed that we will call it a day and let you all get to go home and hope that the three of you who coughed a little bit ago don't have any more problems. We need and want you all to be healthy. With that, we will call it a day. Have a good evening. My calendar is free tomorrow morning. We will be ready to start at 10.

Have a good evening and as always, don't discuss the case at all.

(Thereupon, at 5:35 p.m., the proceeding was adjourned.)

UNITED STATES DISTRICT COURT [3767]
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE, SR.
LANCE HENRY WILSON
MAURICE DAVID STEIER

Docket Nos.
CR 91-0399
CR 92-0086

Washington, D.C.
October 27, 1992
10:15 a.m.

VOLUME XVIII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE STANLEY S. HARRIS,
UNITED STATES DISTRICT JUDGE, AND A JURY.

APPEARANCES:

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down notes. If I could have a moment.

(Pause.)

MR. GELBER: Your Honor, we will have to check at some point over the break to make sure. There were no 302s that were generated. That I am confident of. Whether there are rough notes anywhere is something I will have to check. It was a pretty large group of people.

THE COURT: All right.

MR. LEVINE: Your Honor, there is an aspect of this that actually transcends Jencks, and it has to do with the testimony that Mr. Gilliam gave yesterday.

Your Honor, there has been, other than Mr. Gilliam's testimony in the Grand Jury, the transcript with his appearance in the Grand Jury, there has been no Jencks that has emanated from Florida.

Now, the testimony about monthly bribes, as it were, the word blanch is on my tongue, that occurred during 1988, was not the subject of any testimony in that Grand Jury. It was not the subject of the book, the bribe

book, as it were, that was generated at the request of Mr. Howard, generated by Mr. Gilliam, so to the extent that

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there was any mention of that at all, it's at variance with that bribe book, so quite independent of whether there's Jencks material, that information, because it is inconsistent, is Brady material, and it has never been furnished to us. It has never been charged in the indictment.

It is not the subject of any testimony, not only in Florida Grand Jury, the Southern District of Florida. It is not the subject of any testimony in the Grand Jury here, the Grand Jury which the Independent Counsel was the attorney for the government, nor was it the subject of Mr. Gilliam's testimony before the Federal Grand Jury in the Southern District of Mississippi, so what we heard yesterday was an epiphany of yesterday. It happened for the first time, and we ought to have had notice of that.

That's something about which we objected at the bench yesterday at side bar, but more significantly, not having had notice, it makes it even more imperative that we have whatever records there may be that exist, maybe even in the form of rough notes that pertain to it, so we would request that, your Honor.

THE COURT: All right. Anything you want

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to add, Mr. Howard, to what we said at side bar yesterday afternoon?

MR. GELBER: Your Honor, just so the record is very clear, the government's indictment from Florida — and as the prosecutor from Florida I can testify about that. I am familiar with it — has the dates of the conspiracy from mid-1985 to March of 1990. The only issue he is raising is the variance. I believe everything Mr. Gilliam says falls within the dates. The scheme that has

been elicited from the testimony is the scheme of the government's case. Whether or not it is a variance, I am not sure what the argument is. I think they can certainly cross-examine him on that.

There is no Brady here. There is no variance issue because as far as the indictment to which Mr. Briscoe, Mr. Steier, that was returned against them, he has testified consistently that.

I am unaware of any argument that is being made now. If one is, I will answer it.

MR. LEVINE: One is, so maybe we can get the answer. The argument is it is the inconsistency that is at issue here, the inconsistency. I'm not arguing, at least at this time, about the time period of the conspiracy. First of all, it is a

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bribe that is alleged to have occurred up to 1990. Now, we asked in a bill of particulars what was the official act. We were not told. We asked what the bribe was. We were not told.

The motion for the bill of particulars both in Florida and here was denied, so we don't know what the bribe is until we hear it from the witness stand, and what we heard yesterday for the first time was that in 1988 there were these monthly events.

Now, we should have been told about that because it may well be that there is an alibi. Now, the date in question that this witness says he went to Florida to pick up cash, if Mr. Briscoe was elsewhere, we would be able to prove that were we to have had notice as to when it was, so we asked for that, and we weren't provided with that.

Now, we learn that there is an inconsistency, so, sure, we can cross-examine. We intend to cross-exam-

ine, but what we want and what the government has a duty to provide is the materials which will assist in that cross-examination. That's the argument that we asked Mr. Gelber to address.

MR. GELBER: Umm —

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MR. LEVINE: I would ask him to advise the Court, your Honor, when they first learned of this — of these monthly 1988 payments.

MR. GELBER: Your Honor, I will be glad to tell the Court that. Well before we indicted this case we learned of Mr. Gilliam's allegations. That was the basics of the indictment. In the Grand Jury, which has been given over as Jencks material from Florida, he discusses payments of 2,000 in December of 1989 and a thousand in January of 1990. He talks about post-HUD payments he received from Mr. Briscoe. There has never been a secret, a coverup. Indeed, the dates of the indictment are to include that payment. That is why our indictment says until March of 1990. It purposefully is a date to include all of those payments. We were aware of them. That is why they are there.

All the documents for that was given to Mr. Levine, I believe a year to two years ago. We responded to Rule 16 within 15 days of our indictment in Florida, so I had to produce within two weeks of our indictment every document we intended to rely upon as evidence. The documents that are being referred to the witness today have Bates stamps on the bottom of that. I put those

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Bates stamps on years ago and promptly relayed them to all counsel except for Mr. Wells because his client was not indicted in our indictment.

That's essentially the business area. There is no issue. There is variance. This is the individual's testimony, and there is no obligation.

Insofar as the bill of particulars goes, he made a request for the bill of particulars, and the court in Florida, I believe this Court as well, I think, denied it. He has had notice. He understands what the charges are. There is mention in the Grand Jury of these subsequent payments. If we don't go into the detail he would like, that is our decision and our choice, and he is free to cross-examine Mr. Gilliam as he pleases. I don't think there is any place here for the Court to take any action because I don't think anything has happened such that there is a basis for any relief.

MR. LEVINE: Your Honor, sometimes I wonder if I am in the wrong courtroom. He addressed, Your Honor, something that he talked about in 1990 and the end of 1989. I said nothing about 1990 and the end of 1989. The testimony yesterday was with respect to monthly payments in

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the year of 1988. That is not the subject of Mr. Gelber's response. It is not the subject of any evidence before this Grand Jury. It is not the subject of any evidence before the commerce — the Lantos Committee. It is not any testimony before the Southern District of Mississippi. They have given us no Jencks material from Florida, none.

Now, we asked the question when did they learn of the alleged cash payments during the year 1988. Now, if the answer is we just learned of it the other day, then I understand and that explains why they didn't provide the information. That would be a legitimate answer, but if they had it, they should have told us. That, they didn't, and that is what we are trying to ascertain, your Honor, and

the issue here is one of inconsistency. There is a book. The government had it marked. It is an exhibit in this case. That book, according to this witness, ostensibly sets forth the whole of the bribes. None of the 1988 testimony is in that book.

Now, that's the fact from their witness, so this is inconsistent with this book, and that's a

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Brady obligation, your Honor. If they are aware of inconsistencies, they must tell us, and they haven't. We learned of it yesterday for the first time which is called classic ambush on the witness stand during trial, and we don't think that is the way it ought to be done.

MR. GELBER: Your Honor, I will read from the Grand Jury transcript that was given to Mr. Levine, I believe, sometime ago.

"Question: Did he pay you that money?

"Answer: He paid it and plus some.

"Question: How did he pay you?

"Answer: In cash disbursements which started in December of 1987 and continued until August of 1989.

"Question: And how much monies would he give you in these disbursements?

"Answer: Sometimes I would get 700 to a thousand. Sometimes 5,000, 2,500.

"Question: Were you not using an investment?

"Answer: I was taking it myself."

This is exactly what the witness was talking about. It is not Brady. The fact that he goes into no specificity, there is no obligation for

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us to do that. The practice is we don't go into specificity in the Grand Jury. I don't know why we are spending all of this time going into it.

MR. LEVINE: It is not what he testified about yesterday, your Honor. I will rely on the Court's recollection, but my recollection is he talked about monthly payments between 2,500 and $4,000 going to Florida. Then we got into this debate as to whether or not the ostensible corroboration, the airline tickets matched the testimony. We learned yesterday how incoherent it was and how confused it was and how it didn't support the contention advanced by the witness. We have a right to have it with precision, your Honor, not with the ambiguity that he thinks is appropriate. That is not in our view, and I say this with the greatest amount of respect, consistent.

THE COURT: Of course I have not been privy to discovery, and I don't see that there is any relief that is appropriate for me at this point.

This will break Mr. Howard's Eastern District of Virginia heart, but I have been told by the marshal that a couple of the women on the jury

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are expressing concern about our recessing hour with our having lost daylight savings time, so I think we are not going to be able to go to a quarter of 6 or even 5:30, as we have been doing, and keep a contented jury. I think we will have to recess a little bit earlier.

Anything else before we bring them in?

MR. LEVINE: Your Honor, I guess I will just say we move to dismiss on those grounds.

THE COURT: The motion is denied.

MR. LEVINE: Thank you.

(In open court, jury present.)

THE COURT: Good morning, ladies and gentlemen.

I sometimes like in trials — and I don't know if I have said this to you before. We have been together a number of weeks, and it is a little bit like a pregnancy in that you start it and we go all the way through it, and then it ends, and to sort of move back our ending time we have pushed and we have gone to about 5:30, a quarter to 6 as we have been able to do so in an effort to try to shorten the time at the end.

I understand that a couple of you have expressed concern about it getting darker earlier

[3780, Δ p.14]

now that daylight savings time is over, so we will start recessing a bit earlier than we have been.

Mr. Howard?

MR. HOWARD: Thank you, your Honor.

DIRECT EXAMINATION (continued)

BY MR. HOWARD:

Q. Mr. Gilliam, good morning.

A. Good morning.

Q. Yesterday when you stopped testifying I believe you were identifying different travel records for trips to West Palm between January and November of 1988, and with that I would like to show you two more records, Government's Exhibit 101H, and I am going to ask you what Government's Exhibit 101H is?

A. It is a ticket purchased by me at Washington National to go to West Palm Beach from Raleigh/Durham, North Carolina.

Q. Why were you going there?

A. To pick up some money from Leonard Briscoe.

Q. That seems to be just a one-way ticket. Do you know how you returned?

A. That's just the one ticket.

Q. That just seems to be one part of the

[3781, Δ p. 15]

ticket; is that correct?

A. Yes.

Q. I am going to show you also what has been marked as Government's Exhibit 101D and ask you if you recognize 101D? You can pull that out of the plastic sleeve, sir.

A. This is a hotel receipt from the Royce Hotel in West Palm Beach, Florida.

Q. Do you recognize it?

A. Yes, I do.

Q. How do you recognize it?

A. My signature is on the bottom.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 101H and 101D into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection, your Honor.

THE COURT: Thank you. Government's Exhibits 101D and 101H are received in evidence.

(Government's Exhibit Numbers 101D and 101H were received in evidence.)

BY MR. HOWARD:

Q. What is the date on the Government's Exhibit 101H?

[3782, Δ p. 16]

A. October 12, 1988.

Q. On the hotel record, Government's Exhibit 101D for the Royce Hotel, would you tell the members of the jury what day you were staying there.

A. I checked in on 10-12-1988.

Q. Is that where you stayed overnight?

A. Yes.

Q. The tickets that you have identified, you identified yesterday and the hotel that you identified today, will you tell the members of the jury how you paid for that.

A. Cash.

Q. And where did you get the cash?

A. I had cash when I paid for the room.

Q. Is there any reason why you paid for cash?

A. I paid cash all the time.

Q. Where did you get the cash?

A. That was money I had when I arrived in West Palm Beach.

Q. Sir, you mentioned that later you and Mr. Briscoe decided to go in on the Yonkers project. Do you remember that testimony from yesterday?

A. Yes.

Q. Will you tell the members of the jury what

[3783, Δ p. 17]

the Yonkers project was?

A. Yonkers, New York had been court-ordered to develop units under the affordable housing program, and it was under the jurisdiction of the Frederick Court in that area, and it was under order to produce 4,000 units of affordable housing which had to be developed, and they were looking for developers from around the country to come in and develop affordable housing units as far as builders and developers.

Q. What were you and Mr. Briscoe intending to do with regard to the Yonkers project?

A. If we could have an opportunity, we would have done work as far as building affordable housing in Yonkers, New York.

Q. What was your role in this?

A. I was a housing consultant with Leonard Briscoe.

Q. What were you planning to do for this?

A. I was planning to try to develop a real estate affordable housing portfolio in Yonkers, New York.

Q. Were you able to do such a thing?

A. No.

Q. Did you get paid?

[3784, Δ p.18]

A. Yes.

Q. How much were you getting paid?

A. $3,500 a month. That started in 12-88 and ended in August or September of 1989.

Q. Were you getting paid every month?

A. Yes.

Q. What work did you do?

A. Initially, I had the director for the housing program come down to see Mr. Briscoe's project of Wedgewood Apartments, and then Mr. Briscoe and I made a trip together to Yonkers, New York, and this was around December or January of 1988 or January of 1989. Then there was a second trip made to Yonkers, New York whereby Mr. Briscoe and I and his architect/engineer came up and attended the meeting as well.

Q. I am going to show you Government's Exhibit 102. You can pull that out of the sleeve, if you want. Do you recognize Government's Exhibit 102, Mr. Gilliam?

A. This is a copy of a housing consulting agreement between myself and Leonard Briscoe.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 102 into evidence.

MR. LEVINE: Your Honor, that is not what

[3785, Δ p. 19]

we have as 102 supplied by the government.

THE COURT: All right. Perhaps you two could check informally as to where we are.

(Discussion off the record.)

MR. LEVINE: Mine is a letter and an agreement. We just have the agreement. I am sorry.

(Discussion off the record.)

THE COURT: Are we straight?

MR. LEVINE: I think so. I would like the witness to identify the full document.

BY MR. HOWARD:

Q. Do you recognize that, sir?

A. I recognize the agreement. I do not recognize the cover letter.

Q. What is on the bottom?

A. There is a CC to myself.

Q. Do you remember getting a CC?

A. No.

Q. MR. HOWARD: Your Honor, we would move Government's Exhibit 102 into evidence.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection, your Honor.

MR. DAVIS: No objection.

THE COURT: Government's Exhibit 102 is [3786, Δ p. 20] received in evidence.

(Government's Exhibit Number 102 was received in evidence.)

BY MR. HOWARD:

Q. Mr. Gilliam, would you tell the members of the Grand Jury what Government's Exhibit 102 is.

A. It is a housing consulting agreement essentially describing what my duties and responsibilities would be and what the payment arrangements were between Mr. Briscoe and I on performing certain duties, and this is an agreement we entered into involving Yonkers, New York. This contract was primarily for Yonkers, New York, and that's it.

MR. LEVINE: Objection. Incomplete, your Honor, description.

THE COURT: I missed part of his answer.

MR. HOWARD: My answer?

THE COURT: No. His answer. I am sorry. Let me find out where we are.

MR HOWARD: All right.

(At the side bar.)

THE COURT: I might say — off the record.

[3787, Δ p. 21]

(Discussion off the record.)

MR. LEVINE: Let me help you out here. The witness — this document, your Honor, which is Government's 102, was initially identified by the witness as being the agreement, and that's what prompted the first objection which was that we may have different documents. Mr. Howard told us during the conference at counsel table that it was, in fact, a five-page exhibit. It included a letter from Mr. Jerris Leonard to Sarah Lord of the Public Integrity Section at the Criminal Department, where Mr. Leonard Briscoe transmits the agreement.

The question that was identified by Mr. Howard was, can you identify the agreement, and the witness said it is an agreement, described the agreement that existed between himself and Mr. Briscoe, and said that's it, and what brings us here is that the description is an incomplete one because it didn't include a description of the letter. He didn't identify the document is what we are talking about here.

THE COURT: Okay. You will ask him if there was a letter?

MR. HOWARD: I will, your Honor.

MR. LEVINE: That's it.

[3788, Δ p. 22]

(In open court, jury present.)

MR. HOWARD: If I can proceed?

THE COURT: Yes, sir.

MR. HOWARD: Thank you.

BY MR. HOWARD:

Q. Mr. Gilliam, what was this document for?

MR. LEVINE: Your Honor, we didn't get a full description of the document.

MR. HOWARD: Your Honor, —

THE COURT: You may proceed.

MR. HOWARD: Thank you.

BY MR. HOWARD:

Q. What was this document for?

A. This is an agreement between Leonard Briscoe and I where I was to perform certain duties involving the housing units and development units in Yonkers, New York.

Q. What was it for?

A. The original purpose of it was, was it was because of the fact that Mr. Briscoe had — and I had talked about the fact I was receiving cash payments each month that he was taking as personal income. He was concerned about the taxes that could be owed on that money, and we had to find a different method in which to give me some funds, so

[3789, Δ p. 23]

I told him to find a housing project for us to work on, and in this particular case, I identified Yonkers, New York as that project whereby we paid a consultant fee of $3,500 a month, plus expenses.

If we had been successful, if the application had been successful and been awarded to develop, say, four or 500 units in Yonkers, New York, that figure of $3,500 would have changed to a figure that he and I would have agreed upon at that point in time.

Q. Did you actually do any work in Yonkers?

A. During the months of December and January there were.

Q. You said you were paid between December of '88 and August '89. Other than those two months did you do any work in Yonkers?

A. Not after January.

Q. Were you paid every month?

A. I was paid every month.

Q. I am going to show another letter, Government's Exhibit 42. Do you recognize Government's Exhibit 42?

A. This is a letter from myself to Leonard Briscoe reporting to him on the activities that occurred during the month of December concerning the

[3790, Δ p. 24]

Yonkers housing development program.

Q. Do you recognize your signature at the end?

A. Yes, I do.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 42 into evidence.

MR. LEVINE: No objection.

MS. ROGERS: No objection.

MR. DAVIS: No objection.

THE COURT: Government's Exhibit 42 is received in evidence.

(Government's Exhibit Number 42 was received in evidence.)

BY MR. HOWARD:

Q. Why did you generate the document?

A. I was giving him the report of what was being done, of the activity in the month of December.

Q. Other than the month of December did you generate any other reports?

A. No.

Q. Why?

A. It wasn't necessary.

Q. What do you mean it wasn't necessary?

A. It wasn't needed because of the fact that

[3791, Δ p. 25]

after January we were not going to be able to go forward with any housing development opportunities in Yonkers, and from that point on I just received the monthly payments each month.

Q. Why weren't you able to go forward with any housing development activities in Yonkers?

A. The cost of doing business up there was very expensive. It required someone who had extensive experience in developing high-rise apartment buildings, and it just wasn't something that at that point in time the Briscoe development group could go forward with.

Q. Were you going to Yonkers?

A. Yes, I was.

Q. What were you doing there?

A. I was going up to Yonkers, New York to see the director, the trustee for the Yonkers housing program.

Q. Who was that?

A. Ms. Karen Hill.

Q. Were you up there to see her on business.

A. No.

Q. Were you up there to see her socially?

A. Yes.

Q. Did you do any business?

[3792, Δ p. 26]

A. No.

Q. I am going to show you what has been marked as Government's Exhibit 69. I am going to ask you if you recognize Government's Exhibit 69?

A. Yes. A letter from Leonard Briscoe dated January 10, 1989 to myself.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 69 into evidence.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection, your Honor.

MR. DAVIS: No objection.

THE COURT: Government's Exhibit 69 is received in evidence.

(Government's Exhibit Number 69 was received in evidence.)

BY MR. HOWARD:

Q. Mr. Gilliam, will you tell the members of the jury what Government's Exhibit 69 is.

A. It is a short letter from Mr. Briscoe to me, as I stated earlier, dated January 10, 1989 indicating that per our telephone conversation he would wire transfer $3,500 to my account that I had designated.

Q. What was this wire transfer for?

A. It was payment for the Yonkers, New York

[3793, Δ p. 27]

project and followed through with our agreement we had already signed on.

Q. Did you receive other payments than the one —

MR. LEVINE: Your Honor, I object. That is a very misleading and incomplete description.

THE COURT: Could you, please, not argue from the well of the court. If you have an objection, let's discuss it, Mr. Levine.

(At the side bar.)

THE COURT: I would ask, Mr. Levine, that you argue your objections, not argue your objections from the well of the court.

MR. LEVINE: You are right, your Honor. You told me before, and I apologize.

This is a short letter. It is about 8 or 10 lines long, and the description of it is woefully misleading. It says, "Pursuant to our telephone conversation today and response to our January 1989 letter, we have wire transferred to your account $3,500 as payment on our monthly agreement."

That is the way he described it, but this goes on to talk about the business. "I will be available any time between the next 10 days to inspect the site mentioned in your letter. I would

[3794, Δ p. 28]

like to point out it appears that the competition is going to be very stiff, if we are having to compete with Trammell Crow, Lincoln Properties and others mentioned in your letter. I am anxious to hear from you further after your meeting of January 12, 1989. Very truly yours."

The picture they are trying to portray is there was money for the work, and that description of the letter is misleading, and if we are really engaged here to find the truth, then that kind of an answer doesn't describe this letter, and the government's response should not be deal with it on cross because you can't deal with everything on cross. Direct takes days and days, and he ought to be required to give an accurate description or not describe it at all and let it speak for itself.

THE COURT: Yes, sir.

MR. HOWARD: I don't have a response to that.

THE COURT: The government can present its case. You object; I rule. If you make a request, I will rule. It seems to me that the government is entitled to go this way unless it is objectionable. I don't find it objectionable.

MR. LEVINE: The objection is it is

[3795, Δ p. 29]

designed to adduce a misleading answer, and I object.

THE COURT: If you think it is misleading, tell me. Don't tell the jury. I ask that you not do from the well of the court.

MR. LEVINE: Your Honor, on the doctrine of completeness, we ask that the letter now be read.

THE COURT: It is up to Mr. Howard.

MR. LEVINE: We ask the Court to require that of the government.

THE COURT: I am not going to require this.

(In open court, jury present.)

THE COURT: The objection is overruled.

BY MR. HOWARD:

Q. Did you receive other payments from Mr. Briscoe?

A. Yes.

Q. I would like to show you what has been marked as Government's Exhibit 70C. Do you recognize Government's Exhibit 70C?

A. Yes.

Q. How do you recognize it?

A. It is a copy of the deposit that went into

[3796, Δ p. 30]

my account for a wire transfer, and that is my account number on the bottom.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70C into evidence.

MR. DAVIS: No objection.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection.

THE COURT: Government's Exhibit 70C is received into evidence.

(Government's Exhibit Number 70C was received in evidence.)

BY MR. HOWARD:

Q. The wire transfer into your account, can you tell the members of the jury what day that went in.

A. 1-10-89.

Q. And would that be the —

MR. LEVINE: Leading, your Honor. Objection.

Q. Would that be —

THE COURT: He may answer the question.

Q. Would that be the wire transfer reflected in Government's Exhibit 69?

A. Yes.

Q. How much money was transferred into your [3797, Δ p. 31] account?

A. $3,495.

Q. And where did it come from? Who gave it to you?

A. From Mr. Briscoe.

Q. I would like to show you what has been marked as Government's Exhibits D and E.

MS. ROGERS: Is there a number?

MR. HOWARD: I am sorry. 70D, like in dog, and E, as in excellent.

BY MR. HOWARD:

Q. Do you recognize Government's Exhibit 70D?

A. Yes.

Q. How do you recognize 70D?

A. It was a check made out to me from the Briscoe Company of $3,500, and I endorsed it on the back of it, and I cashed it while I was in Florida.

MR. HOWARD: Your Honor, the government would move 70D into evidence.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection, your Honor.

MR. DAVIS: No objection.

THE COURT: Government's Exhibit 70D is received in evidence.

(Government's Exhibit Number 70D was received in evidence.)

[3798, Δ p. 32]

BY MR. HOWARD:

Q. I am going to show you Government's Exhibit 70E and ask you what 70E is for. What is it? Let me back up.

Do you recognize it?

A. Yes. This is a bank deposit slip to me.

Q. Is that your account?

A. Yes.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70E into evidence.

MR. LEVINE: No objection, your Honor.

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

THE COURT: Government's Exhibit 70E is received into evidence.

(Government's Exhibit Number 70E was received in evidence.)

A. I would like to state I did not cash this check in Florida.

Q. Do you know where you cashed it?

A. This is a direct deposit to this account in Washington, D.C.

Q. So 70E was a direct deposit as reflected in Government's Exhibit 70E?

[3799, Δ p. 33]

A. Yes.

Q. What is 70D?

A. A check which is dated 12-12-88.

Q. What date is the deposit?

A. The deposit is December 14th, 1988.

Q. How much is the check for, Government's Exhibit 70D?

A. $3,500.

Q. Where did you get that money?

A. From Mr. Briscoe.

Q. I would like to show you Government's Exhibit 70G, as in go, and ask you if you recognize Government's Exhibit 70G.

A. Yes, I do.

Q. Will you tell the members of the jury how you recognize Government's Exhibit 70G.

A. This is a check from Mr. Briscoe to me dated February 6, 1989 for $3,500, and my signature is on the back of the check as far as endorsing it.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70G into evidence.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection, your Honor.

Q. What is the date on that —

THE COURT: Oops.

[3800, Δ p. 34]

MR. DAVIS: No objection.

THE COURT: Government's Exhibit 70G is received in evidence.

(Government's Exhibit Number 70G was received in evidence.)

BY MR. HOWARD:

Q. What's the date on Exhibit 70G?

A. February 6, 1989.

Q. And the amount?

A. $3,500.

Q. Where did you get that?

A. From Mr. Briscoe.

Q. I would like to show you Government's Exhibit 70I and ask you if you recognize Government's Exhibit 70I?

A. Yes, I do.

Q. How do you recognize it?

A. It is a wire transfer to my bank account, Riggs National Bank in McLean, Virginia.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70I into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection, your Honor.

THE COURT: Government's Exhibit 70I is

[3801, Δ p. 35]

received in evidence.

(Government's Exhibit Number 70I was received in evidence.)

BY MR. HOWARD:

Q. What is the date on Government's Exhibit 70I, Mr. Gilliam?

A. 3-7-89.

Q. How much is that?

A. $4,081.

Q. Do you know who the wire transfer came from?

A. Mr. Briscoe.

Q. I am going to show you Government's Exhibits 70J and 70K. First, I will show you Government's Exhibit 70J. I will ask you if you recognize Government's Exhibit 70J?

A. Yes, I do.

Q. How do you recognize Government's Exhibit 70J?

A. It's a check from Mr. Briscoe to me of $3,500 dated 4-12-89. I put my signature on the back of the check with my license number.

Q. Your driver's license number?

A. Yes.

MR. HOWARD: Your Honor, the government [3802, Δ p. 36] would move Government's Exhibit 70J into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection.

MR. LEVINE: No objection.

THE COURT: Government's Exhibit 70J is received in evidence.

(Government's Exhibit Number 70J was received in evidence.)

BY MR. HOWARD:

Q. What is Government's Exhibit 70K?

A. This is a deposit on April 14, 1989 for $3,100.

Q. Do you recognize that?

A. Yes.

Q. How?

A. This is what I got from Mr. Briscoe during that month.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70K into evidence.

MR. DAVIS: No objection.

MR. LEVINE: No objection, your Honor.

MS. ROGERS: No objection, your Honor.

THE COURT: Government's Exhibit 70K is received in evidence.

(Government's Exhibit Number 70K was

[3803, Δ p. 37]

received in evidence.)

BY MR. HOWARD:

Q. What is the date on the check, Government's Exhibit 70J, Mr. Gilliam?

A. 4-12-89.

Q. Was that for work on the Yonkers project?

A. Yes.

Q. Do you know where you got that check?

A. Mr. Briscoe.

Q. Do you know where, geographically where you picked it up?

A. No, not at this time.

Q. I am going to show you what has been previously marked as Government's Exhibit 101C and Government's Exhibit 101G. First, I am going to ask you if you recognize Government's Exhibit 101C?

A. Yes.

Q. What is Government's Exhibit 101C?

A. This is an airline ticket.

Q. How do you recognize it?

A. My name is on it.

Q. Where is it to?

A. It is going to West Palm Beach from Raleigh, North Carolina out of the Washington National Airport.

[3804, Δ p. 38]

MR. HOWARD: Your Honor, the government would move Government's Exhibit 101C into evidence.

THE COURT: That was received yesterday.

MR. HOWARD: Your Honor, it was withdrawn.

THE COURT: I am sorry. I failed to reflect that. I am assuming that is correct.

How do you have it?

THE CLERK: Withdrawn.

MR. DAVIS: No objection, your Honor.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection.

THE COURT: Government's Exhibit 101C is received in evidence.

(Government's Exhibit Number 101C was received in evidence.)

BY MR. HOWARD:

Q. Do you recognize Government's Exhibit 101G, Mr. Gilliam?

A. Yes, I do.

Q. How do you recognize that document?

A. This is a ticket with my name on it that I purchased in Miami from Continental Airlines.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 101G into evidence.

[3805, Δ p. 39]

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection, your Honor.

THE COURT: Government Exhibit 101G is received into evidence.

(Government Exhibit's Number 101G was received in evidence.)

BY MR. HOWARD:

Q. Mr. Gilliam, will you tell the members of the jury what Government's Exhibit 101G is, date and destination, please.

A. This is a round-trip ticket from the Washington National Airport dated April 11, 1989 going from Washington National to Miami International Airport in Miami, Florida, and there is a return ticket going back from Miami on April 12, 1989 to Washington National Airport.

Q. What is Government's Exhibit 101C?

A. That is a — I exchanged tickets and replaced the return ticket that read from Miami to Washington National for a new ticket that took me from West Palm Beach, Florida to Raleigh/Durham.

Q. When you took the flight what was your destination? Where were you originally trying to go?

[3806, Δ p. 40]

A. West Palm Beach.

Q. Why were you trying to go to West Palm Beach?

A. To pick up some money.

Q. Do you know what money you were about to pick up?

A. Yes.

Q. What money were you trying to pick up?

A. The money from the Yonkers project.

Q. Were you picking up 70J?

A. Yes.

Q. I would like to show you Government's Exhibit 70L. Will you tell the members of the jury whether you recognize Government's Exhibit 70L?

A. Yes, I do.

Q. How do you recognize it?

A. This is a check that I had gotten, a cashier's check for $3,100.

Q. Do you recognize it?

A Yes.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70L into evidence.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: : Can we have a date?

A. April 13th, 1989.

[3807, Δ p. 41]

MR. DAVIS: No objection.

MR. LEVINE: No objections, your Honor.

THE COURT: Government Exhibit 10 — I am sorry, 70L is received in evidence.

(Government's Exhibit Number 70L was received in evidence.)

MR. HOWARD: Your Honor, I believe I moved Government's Exhibit C and G in.

THE COURT: That's correct, sir.

BY MR. HOWARD:

Q. Will you tell the members of the jury what government — the amount on the check that is on Government's Exhibit 70L.

A. $3,100.

Q. What is the date on it, sir?

A. April 13, 1989.

Q. Where did you get that check?

A. Flagler National Bank in West Palm Beach, Florida.

Q. Do you know where the money came from?

A. Mr. Briscoe.

Q. Was this also for the Yonkers project?

A. I got $7,500 from him total that day, and this was not related to the Yonkers project.

Q. What was it related to, sir?

[3808, Δ p. 42]

A. I had to pay my attorney at that time some money, and I asked Mr. Briscoe for an advance on some funds, and he provided it to me.

Q. What were you paying an attorney for?

A. Because I was under investigation at the time on the Crown Bay Development project and, also, the Southern District of Mississippi investigation involving the Biloxi Waterfront Development.

Q. Why did you go to Mr. Briscoe for money?

A. Because I had been getting money from him, and I asked him for some additional money.

Q. I am going to show you what has been marked as Government's Exhibit 70M. Do you recognize Government's Exhibit 70M?

A. Yes, I do.

Q. Will you tell the members of the jury how you recognize Government's Exhibit 70M.

A. It is a check that I received from Mr. Briscoe, and I endorsed the back, and I put my driver's license number on the back.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70M into evidence.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection, your Honor.

MR. DAVIS: No objection.

[3809, Δ p. 43]

THE COURT: Government's Exhibit 70M is received in evidence.

(Government's Exhibit Number 70M was received in evidence.)

BY MR. HOWARD:

Q. What is Government's Exhibit 70M, Mr. Gilliam?

A. It is a check from Leonard Briscoe to Dubois Gilliam dated 4-13-89 for $7,500, and it describes the money as an advance on the Yonkers, New York project.

Q. Was this an advance?

A. That is what it was described as, as an advance, yes.

Q. Do you remember what it was for?

A. Yes.

Q. What was it for?

A. It was to help me cover some legal expenses.

Q. What legal expenses?

A. Legal expenses I had incurred from representation on the Crown Bay development project. I was under investigation for the Biloxi Waterfront Development in Biloxi, Mississippi.

Q. Do you know why it is described on the

[3810, Δ p. 44]

check as an advance for the Yonkers project?

A. That was the way it was listed when I got the money.

Q. Do you know why?

A. No.

Q. I am going to show you what has been marked as Government's Exhibit 70O. Do you recognize Government's Exhibit 70O?

A. Yes, I do.

Q. How do you recognize it?

A. It is a wire transfer to my account at The Riggs National Bank of Virginia.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70O into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection, your Honor.

THE COURT: Government's Exhibit 70O is received into evidence.

(Government's Exhibit Number 70O was received in evidence.)

BY MR. HOWARD:

Q. Will you tell the members of the jury the date on that wire transfer into your account.

A. 5-4-89.

[3811, Δ p. 45]

Q. What is the amount?

A. $4,995.

Q. Do you know what that transfer is for?

A. Yes.

Q. What?

A. It was payment on the Yonkers agreement, plus — that was $3,500, plus expenses.

Q. You had a little over a thousand dollars worth of expenses?

A. Yes.

Q. Did you actually incur expenses?

A. No. Not for the project itself.

Q. Did you incur some expenses for something else?

A. Yes, I did.

Q. For what?

A. I had been up to New York to see Ms. Hill, and we went out to dinner and did other things and ran up some expenses.

Q. Did you tell Mr. Briscoe that?

A. No, I did not.

Q. I am going to show you what has been marked as Government's Exhibit 70Q. Do you recognize Government's Exhibit 70Q?

A. Yes, I do.

[3812, Δ p. 46]

Q. What is Government's Exhibit 70Q, sir?

A. It is a wire transfer dated 5-11-89.

Q. Is that under your account?

A. Yes, it is.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70Q into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection.

MR. LEVINE: No objection, your Honor.

THE COURT: Government's Exhibit 70Q is received in evidence.

(Government's Exhibit Number 70Q was received in evidence.)

BY MR. HOWARD:

Q. Will you tell the members of the jury the date on the transfer into your account reflected on Government's Exhibit 70Q.

A. The amount is $3,495. It was a wire transfer to my account from Mr. Briscoe to the Riggs National Bank of Virginia.

Q. What is the date?

A. The date is 5-11-89.

Q. What is the amount?

A. $3,495.

Q. What was that for?

[3813, Δ p. 47]

A. The Yonkers project.

Q. I am going to show you what has been marked as Government's Exhibit 70S, S like in Sam. Do you recognize that?

A. Yes.

Q. How do you recognize it?

A. It is a wire transfer from my account to Mr. Briscoe.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70S into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: None here either, your Honor.

THE COURT: Government's Exhibit 70S is received into evidence.

(Government's Exhibit Number 70S was received in evidence.)

BY MR. HOWARD:

Q. Mr. Gilliam, will you tell the members of the jury the date and the amount on Government's Exhibit 70S.

A. The date is 6-7-89. The amount is for $4,714.20.

Q. What was that for?

[3814, Δ p. 48]

A. That was, part of that was for the Yonkers, New York agreement that we had had between Mr. Briscoe and myself for $3,500.

Q. You said part of it. What was the other part for?

A. The other part was for expenses.

Q. Did you have expenses again?

A. No. This was — the telephone expenses was included in the bill.

Q. Who were the telephone calls to?

A. I don't recall right now.

Q. I am going to show you what has been marked as Government's Exhibit 70U and ask you if you recognize Government's Exhibit 70U?

A. Yes, I do.

Q. How do you recognize it?

A. It is a wire transfer to my account at The Riggs Bank of Virginia.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70U into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection, your Honor.

MR. LEVINE: No objection.

THE COURT: Government's Exhibit 70U is received in evidence.

[3815, Δ p. 49]

(Government's Exhibit Number 70U was received in evidence.)

BY MR. HOWARD:

Q. Mr. Gilliam, will you tell the members of the jury the date and the amount of Government's Exhibit 70U.

A. The date is 7-10-89. The amount is $3,495.

Q. Do you know who that transfer came from?

A. It came from Mr. Briscoe.

Q. I am going to show you Government's Exhibit 70W and ask you if you recognize that document, sir?

A. Yes, I do.

Q. How do you recognize it?

A. It is a wire transfer to my account at The Riggs National Bank of Virginia.

MR. HOWARD: Your Honor, the government would move Government's Exhibit 70W into evidence.

MR. DAVIS: No objection.

MS. ROGERS: No objection.

MR. LEVINE: No objection, your Honor.

THE COURT: Government's Exhibit 70 W is received in evidence.

(Government's Exhibit Number 70W was

[3816, Δ p. 50]

received in evidence.)

BY MR. HOWARD:

Q. Will you tell the members of the jury, Mr. Gilliam, the date and amount on Government's 70W.

A. The date is 7-1-89, and the amount is $2,295.

Q. Who did that money come from?

A. Mr. Briscoe.

Q. What was it for?

A. I don't know what that amount was for?

MR. DAVIS: Your Honor, may I confer with Mr. Howard one second?

THE COURT: Yes, sir.

(Discussion off the record.)

BY MR. HOWARD:

Q. Can you read that?

A. I can't read it.

Q. It looks like a 31? Do you know?

A. I can't read it.

Q. On 70W you are unable to read the date; is that correct?

A. The date is —

MR. LEVINE: Objection. Leading, your Honor.

[51, π p. 3817]

THE COURT: The objection is overruled.

A. The date is not clear on the copy that I have.

Q. Mr. Gilliam, could you pull out Government's Exhibit 102 again, please.

(Witness complies.)

Q. It is the letter and agreement that you had identified earlier. Do you have that in front of you?

A. Yes, I do.

Q. Attached to the agreement that you have previously identified, there is a letter in that exhibit; is that correct?

A. Yes, it is.

Q. Do you know who the letter is addressed to?

A. Ms. Sarah Lord.

Q. Do you know whom Sarah Lord is?

A. Yes.

Q. Who is she?

A. She was a trial attorney in the Criminal Department in the Public Integrity Section that was handling my investigation into the Crown Bay activities.

Q. She is the lady who prosecuted you; is

[52, π p. 3818]

that correct?

A. Yes, she was.

Q. And put you in jail?

A. Yes.

Q. It is sent to her by someone at the bottom. Can you read that name?

A. The name is Jerris Leonard.

Q. Who is Jerris Leonard?

A. He was my attorney at that time.

Q. Do you know if he represented anybody else?

MR. WELLS: Objection, your Honor. May we have a side bar?

(At the side bar.)

MR. HOWARD: I will withdraw the question.

MR. LEVINE: Your Honor, there is a smear going on.

THE COURT: If the question is withdrawn, let's not take up a lot of time.

(In open court, jury present.)

THE COURT: The question is withdrawn.

BY MR. HOWARD:

Q. Mr. Gilliam, did you know that the agreement was going to be sent to Sarah Lord?

[53, π p. 3819]

A. Yes.

Q. How did you know that?

A. Because Mr. Briscoe had — one of the requirements was that he wanted to — he wanted the Justice Department notified that he was retaining me as a consultant on the Yonkers housing project.

Q. Do you know why he wanted to do that?

A. Because of the fact he wanted to make certain there would be no problem as far as any investigation conducted on our part by doing business together.

Q. Did you ever contact Ms. Lord about your working for Mr. Briscoe?

A. No. Mr. Leonard did.

Q. Do you know if Mrs. Lord ever told — was ever told that the money under the Yonkers project was the payback for a bribe?

MR. LEVINE: Objection.

THE COURT: The objection is overruled.

Q. Was Mrs. Lord ever told that?

A. I never had any conversation with Ms. Sarah Lord concerning that.

Q. Do you know if she was ever told that by anyone else?

MR. LEVINE: Objection.

* * *

[3822, Δ p. 56]

money, sir, after the Yonkers project?

A. Yes, I did.

Q. When?

A. I asked Mr. Briscoe for some money in October of 1989. I was getting ready to get — getting prepared to go to prison, and I was beginning to relocate my family from a house we were living in to a housing complex, and I wanted my rent prepaid six months in advance, and I was short of that prepayment amount, and I asked Mr. Briscoe for that difference.

Q. How much money did he give you, sir?

A. He gave me an amount of $1,500 at that time.

Q. How did you get it?

A. Western Union.

Q. Where did it come from?

A. Out of West Palm Beach, Florida.

Q. To where?

A. To Washington — well, you could pick it up anywhere when you got it in Western Union. I picked it up in Washington, D.C.

Q. Mr. Gilliam, why did you ask Mr. Briscoe for $1,500?

A. I asked Mr. Briscoe because in the past

[3823, Δ p. 57]

when I asked for money he gave it to me, so I asked him for it, and he was trying to help me out at that time.

Q. Did you consider this a gift or were you expected to pay this back?

A. Like I said, at that particular time I expected him to help me out as a friend.

Q. Sir, did you ask for any other money from Mr. Briscoe for you or your family?

A. Yes, I did.

Q. When?

A. In November 1989.

Q. What was that for?

A. I had — I called up Mr. Briscoe and told him I wanted to come to Fort Worth, Florida to visit with him, and he made arrangements for me to get a ticket, and I flew down to Fort Worth, Texas, and I visited Mr. Briscoe and told him I was getting ready to go to prison and I

was going to take a hit, that I was supposed to do 18 months and it was at least 12 months that I would be in prison. I told him I needed my family to be taken care of. I asked him if he could give my family $5,000 a month.

Q. You said you were about to take a hit. What does that mean?

* * *

[3828, Δ p. 62]

is. It is not alleged there. Should we look at the indictment? If you look at the indictment I will show it to you.

THE COURT: I take your word for it. I think if you or I were asking questions we might have said did you view this seeking something for your silence, but the term hush money, I don't view as ideal or objectionable.

The objection is overruled.

(In open court, jury present.)

THE COURT: The objection has been overruled.

BY MR. HOWARD:

Q. Mr. Gilliam, was this hush money?

A. I had been given money from Mr. Briscoe and I asked him to help my family out in my absence. In my mind I had made him a lot of money, and I turned to him for help.

Q. I am going to show you what has been marked as Government's Exhibit 68. Do you recognize that?

A. That is a cover letter about a loan to my father from Mr. Travis.

Q. Do you recognize it?

A. This is a letter my dad gave me.

[3829, Δ p. 63]

MR. HOWARD: Your Honor, the government would move Government's Exhibit 68 into evidence.

MR. LEVINE: No objection, your Honor.

MR. DAVIS: I am going to object to this, Judge, as improper and insufficient foundation. I think you need to see the exhibit. May I approach to give you a copy?

THE COURT: Yes.

(Document tendered.)

MR. DAVIS: I don't know if we need a side bar.

I will withdraw the objection.

THE COURT: All right.

MR. DAVIS: May I retrieve that copy?

(Document tendered.)

THE COURT: Government Exhibit 68 is received into evidence.

(Government's Exhibit Number 68 was received in evidence.)

BY MR. HOWARD:

Q. Will you tell the members of the jury, on Government's Exhibit 68, how much money it indicates is being transferred to your father?

A. It states $2,000.

Q. Do you know if your father received

[3830, Δ p. 64]

$2,000?

A. He told me he did.

Q. Who is the author of this letter?

A. Mr. Robert Travis.

Q. Do you know who Robert Travis is?

A. I met him once.

Q. When did you meet him?

A. In November of '89.

Q. Where did you meet him?

A. In his law office.

Q. Who was he supposed to be?

A. Mr. Briscoe's attorney.

Q. Why were you there?

A. I was there to ask Mr. Briscoe to make available to my family a thousand dollars a month in my absence.

Q. Was that request made in front of Mr. Travis?

A. No.

Q. Was that request communicated to Mr. Travis?

A. Yes.

Q. How do you know that?

A. He followed Mr. Briscoe. In our conversation Mr. Travis joined us when he told me he

* * *

[3890]

A. I did not.

Q. Now, focusing your attention on when you testified in front of Mr. Gelber's Grand Jury on September 19th, 1990, is it correct you did not disclose to that Grand Jury that you committed perjury in front of Congress?

A. I did not.

Q. In fact, Mr. Gelber asked you in that Grand Jury "are you cooperating with the Congress of the United

States", and you responded "I am cooperating with the United States Congress", right?

A. It should have been "I had". I had contacted the Office of Independent Counsel and told them there was a large number of mistakes in that transcript from the West Palm Beach Grand Jury.

Q. I accept the change, but the bottom line is when you told them I had cooperated you didn't tell them you had cooperated and also I committed perjury, right?

A. I did not — I did not tell them that I hadn't disclosed everything before Congress.

Q. So that Grand Jury, at least, the returned indictment against Mr. Steier and Mr. Briscoe did not have the benefit of knowing that you had committed perjury in Congress, right?

[3891]

A. They did not know that.

Q. In fact, the Grand Jury that returned the indictment against Mr. Wilson, Mr. Steier and Mr. Briscoe was not advised by you that you had committed perjury in Congress?

A. I have never made a statement before any Grand Jury that I committed perjury before Congress.

Q. So none of the grand juries that indicted these gentlemen were told the whole truth in terms of the fact that you were an admitted perjurer in front of Congress, right?

A. I didn't tell them.

Q. Do you have any knowledge of anybody else telling the Grand Jurors that you committed perjury?

A. No.

Q. So as far as you know, the Grand Jurors were not told that you committed perjury, right?

A. That's correct, sir.

Q. So far we are up to September 19th, 1990. You have testified in Grand Jury in Florida, and you still have not disclosed to either the Independent Counsel or Mr. Gelber's staff that you committed perjury in front of Congress, right?

A. I did not discuss with them that I had not disclosed everything before Congress.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEONARD EDWARD BRISCOE, SR.,
LANCE HENRY WILSON and
MAURICE DAVID STEIER,

Defendants.

Crim. No. 91-399-01 (SSH)

UNITED STATES OF AMERICA

v.

LEONARD BRISCOE and
MAURICE DAVID STEIER

Crim. No. 92-86-01 (SSH)

DEFENDANT LEONARD E. BRISCOE'S
SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, defendant Leonard E. Briscoe respectfully supplements his prior request for jury instructions with the following instructions.

[5]

Count 3

If you unanimously decide that Mr. Briscoe is not guilty of the crime charged in Count 3, please so indicate in the following space:_____. If you find Mr. Briscoe not guilty, move on to consider your verdict for Count 4 and do not consider the questions below.

Only if you unanimously decide that Mr. Briscoe is guilty of the crime charged in Count 3, please answer the following questions:

A. Identify the thing of value which Mr. Briscoe gave, offered or promised to Dubois Gilliam:

_____

_____

_____

B. Identify when such gift, offer or promise was made to Dubois Gilliam:

_____

_____

_____

C. Identify the official act of Dubois Gilliam which the above thing of value was "for or because of":

_____

_____

_____

[7]

Count 5

If you unanimously decide that Mr. Briscoe is not guilty of the crime charged in Count 5, please so indicate in the following space:_____. If you find Mr. Briscoe not guilty, move on to consider your verdict for Count 6 and do not consider the questions below.

Only if you unanimously decide that Mr. Briscoe is guilty of the crime charged in Count 5, please answer the following questions:

A. Identify the thing of value which Mr. Briscoe gave, offered or promised to Dubois Gilliam:

_____

_____

_____

B. Identify when such gift, offer or promise was made to Dubois Gilliam:

_____

_____

_____

C. Identify the official act of Dubois Gilliam which the above thing of value was "for or because of":

_____

_____

_____

[9]

Count 7

If you unanimously decide that Mr. Briscoe is not guilty of the crime charged in Count 7, please so indicate in the following space:_____. If you find Mr. Briscoe not guilty, move on to consider your verdict for Count 8 and do not consider the questions below.

Only if you unanimously decide that Mr. Briscoe is guilty of the crime charged in Count 7, please answer the following questions:

A. Identify the thing of value which Mr. Briscoe gave, offered or promised to Dubois Gilliam:

_____

_____

_____

B. Identify when such gift, offer or promise was made to Dubois Gilliam:

_____

_____

_____

C. Identify the official act of Dubois Gilliam which the above thing of value was "for or because of":

_____

_____

_____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE

CRIMINAL NO. 92-0086

TRANSCRIPT OF PROCEEDINGS

PREPARED FOR: Counsel of Defendant

DATE: Thursday, April 29, 1993

PAGES: 1-43

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Robert M. Weber

Official Reporter

[11]
an enormous amount of material, and it's all been gone through very carefully—and I basically adopt the findings in the presentence report, including the addendum which was prepared after objections by both the Government and by Mr. Briscoe.

And I conclude that while, of course, since we're all agreed Count Three is not a guideline case, I conclude that Count Five is.

With that, I'll be glad to hear from you further.

MR. LEVINE: Thank you, Judge.

With respect to the guideline itself, the probation office concludes that the guideline is number 17 and concludes that as a result, that the guideline period is 24 to 30 months.

THE COURT: Yes, sir, with a criminal history category of I.

MR. LEVINE: That's right, your Honor, yes.

Because, your Honor, it is—well—excuse me—they get to number 17 by taking a base of 7, adding the 8 because Mr. Gilliam is found to be a high-ranking government official—and that's a proposition with which we disagree and we rely on our papers in that regard; and then they add 2 more for multiple gratuities. That's how they get from 15 to 17.

We would respectfully suggest, your Honor, that it is incorrect to add the two; and for the reasons we stated moments earlier, that it is not possible to know whether one gratuity constituted the basis for both of those verdicts

* * *